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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

vs.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit's grant of summary judgment improperly deny Air Wisconsin pilots a right to trial on their claim that their free speech, voting and other Landrum-Griffin rights were infringed in connection with the imposition of a union trusteeship?

2. In Duty of Fair Representation cases, does the restrictive standard followed by the Seventh Circuit unduly circumscribe the rights of union-represented employees to an effective judicial remedy?

3. Are disputed contractual rights of union members arising from a union constitution and related documents subject to drastically different rules of interpretation by the courts than the contractual rights of other parties litigant?

LIST OF PARTIES
TO PROCEEDINGS BELOW

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

v.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, WILLIAM P. HALE, TRUSTEE, and DENNIS HIGGINS, TRUSTEE,

Respondents.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED.....	i
LIST OF PARTIES TO PROCEEDING BELOW.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
PETITION FOR WRIT OF CERTIORARI.....	2
OPINIONS BELOW.....	3
JURISDICTION.....	4
STATUTES INVOLVED.....	4
STATEMENT OF THE CASE.....	8
ARGUMENT.....	22
I. THE QUESTION OF THE LANDRUM-GRIFFIN RIGHTS OF THE UNION DISSIDENTS WARRANTS REVIEW.....	22
II. THE TREATMENT OF AN ARBITRATION AWARD AS AN IMMUTABLE NEGATION OF BARGAINING DUTIES RAISES SERIOUS RAILWAY LABOR ACT ISSUES.....	30

III. THE SEVENTH CIRCUIT'S "INTENTIONAL VIOLATION" STANDARD CONFLICTS WITH THE LESS RESTRICTIVE STANDARD FOLLOWED BY ALL OTHER CIRCUITS IN DFR CASES.... 37

IV. THE USE OF DRASTICALLY DIFFERENT RULES OF INTERPRETATION OF THE CONTRACTUAL RIGHTS OF UNION MEMBERS, AS OPPOSED TO OTHER PARTIES LITIGANT, WARRANTS REVIEW..... 50

CONCLUSION..... 60

TABLE OF AUTHORITIES

	Pages
CASES	
Air Wisconsin Pilots Protection Committee v. Sanderson, 909 F.2d 213 (7th Cir. 1990).....	4, 18 22-23 24,26 27,34 35,38 45,50 53,57
Breininger v. Sheet Metal Workers' Int'l Ass'n Local Union No. 6, ___ U.S. ___, 110 S.Ct. 424 (1989).....	40
Hotel & Restaurant Employees & Bartenders v. Rollison, 615 F.2d 788 (9th Cir. 1980).....	47
J.I. Case v. NLRB, 253 F.2d 149 (7th Cir. 1958).....	31
Lamb v. Miller, 660 F.2d 792 (D.D.C. 1984).....	46
Local Union No. 657 v. Sidell, 552 F.2d 1250 (7th Cir. 1977).....	59

Loretangeli v. Critelli,
853 F.2d 186
(3d Cir. 1988)..... 59

Millwright Local No. 1079
v. United Brotherhood of
Carpenters & Joiners,
878 F.2d 960 (6th Cir. 1989)... 59

Newell v. International
Brotherhood of Electrical
Workers, 789 F.2d 1186
(5th Cir. 1986)..... 59

Perry v. International
Longshoremen's Assn.,
638 F. Supp. 1441
(S.D.N.Y. 1986)..... 52

Pignotti v. Local 3,
Sheet Metal Workers,
343 F. Supp. 236,
(D. Neb. 1972), aff'd,
477 F.2d 825 (8th Cir.),
cert. denied, 414 U.S.
1067 (1973)..... 45

Plumbers & Pipefitters
v. Local 334, Plumbers
& Pipefitters,
452 U.S. 615 (1981)..... 50

Record Club of America
v. United Artists Records,
890 F.2d 1264 (2d Cir. 1989).... 56

Sabolsky v. Budzanski,
457 F.2d 1245 (3d Cir.)
cert. denied,
409 U.S. 853 (1972)..... 46

Sheet Metal Workers'
Association v. Lynn,
___ U.S. ___,
109 S.Ct. 639 (1989)..... 26-29

Vaca v. Sipes,
386 U.S. 171 (1967)..... 38

Virginian Railway Co.
v. System Federation No. 40,
330 U.S. 315 (1937)..... 37

United Steelworkers
v. American Mfg. Co.,
363 U.S. 564 (1960)..... 35

United Steelworkers
v. Enterprise Wheel
and Car Corp.,
363 U.S. 593 (1960)..... 35

United Steelworkers
v. Warrior & Gulf
Navigation Co.,
363 U.S. 574 (1960)..... 35

Textile Workers
v. Lincoln Mills,
353 U.S. 448 (1957)..... 35

Thomas v. United
Parcel Service, Inc.,
890 F.2d 909 (7th Cir. 1989)... 38

STATUTES

28 U.S.C. § 1254(1)..... 5

The Labor-Management and Disclosure Act of 1959 ("Landrum-Griffin Act")

29 U.S.C. § 401 et seq..... 1, 5, 22, 23 24-25 27-28

Section 101(a)(1), 29 U.S.C. § 411(a)(1)..... 5-6

Section 101(a)(2), 29 U.S.C. § 411(a)(2)..... 6, 30

Section 302, 29 U.S.C. § 462..... 7, 28

Section 304, 29 U.S.C. § 464(c)..... 7-8

The Railway Labor Act

45 U.S.C. §§ 151 et seq.... 8, 28

45 U.S.C. §§ 181-182..... 8

Section 2, 45 U.S.C. § 152 First..... 8, 33 34, 40

Section 2, 45 U.S.C. § 152 Third..... 8-9

OTHER AUTHORITIES

Frank Elkouri & Edna Elkouri.
How Arbitration Works
(1985-87 Supplement)
(Washington, D.C.: BNA 1988)... 36

See Holzhauer, The
Contractual Duty of
Competent Representation,
63 Chi-Kent
L. Rev. 255 (1987)..... 44

Restatement of Contracts
2d § 206..... 53

Williston on Contracts,
§ 621 (3d ed. 1961)..... 53-55

Wisehart, "Transportation
Strike Control Legislation:
A Congressional Challenge,"
66 MICH.L.REV. 1697 (1968)..... 31

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Air Wisconsin Pilots Protection Committee, James M. Fenske, Gary M. Pelach, Richard J. Magiera and Thomas K. Bly, plaintiffs in the proceedings below, respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit filed on July 30, 1990. By an order of this Court dated October 20, 1990, the time for filing a petition for a writ of certiorari in the above entitled case was extended to and including November 27, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, Air Wisconsin Pilots Protection Committee v. Sanderson, is found at 909 F.2d 213 (7th Cir. 1990). The unreported decision of the United States District Court for the Northern District of Illinois (Eastern Division) is set forth in the Appendix at pages 4a-20a.[1]

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[1]Citations followed by the suffix "a" refer to the Appendix annexed hereto. Citations preceded by the prefix "A" refer to the Appendix filed by petitioners filed in the United States Court of Appeals in the Seventh Circuit.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on July 30, 1990. The time for petitioning for certiorari was extended to and including November 27, 1990, by an order of this Court. (1a.)

STATUTES INVOLVED

The Labor-Management and Disclosure Act of 1959 ("Landrum-Griffin Act"), 29 U.S.C. §§ 401 et seq., contains provisions guaranteeing the free speech and voting rights of union members, and protects them against abusive trusteeships imposed upon subordinate bodies or officers.

Section 101(a)(1), 29 U.S.C. §

411(a)(1), provides in pertinent part that every union member

> "... shall have equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organization . . . and to participate in the deliberations and voting upon the business of such meetings, subject to the reasonable rules and regulations in such organization's constitution and bylaws."

Section 101(a)(2), 29 U.S.C. § 411(a)(2), guarantees to a union member the

> "... right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organizations his views . . . upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct which would interfere with its performance of its legal

or contractual obligations." (Emphasis added.)

Section 302, 29 U.S.C. § 462, provides that trusteeships over a subordinate union body must be established must be established

> "...only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organizations." (Emphasis added.)

Section 304(a), 29 U.S.C. § 464(a), provides in pertinent part:

> "Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate."

Section 304(c), 29 U.S.C. § 464(c), provides in pertinent part:

> "After the expiration of the eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302." (Emphasis added.)

Under the Railway Labor Act, as amended, 45 U.S.C. §§ 151 et seq., which is made applicable to air carriers by 45 U.S.C. §§ 181-182, Section 2, 45 U.S.C. § 152 First, provides in pertinent part that bargaining agents have the duty

> "...to exert every reasonable effort to make and maintain agreements, concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute

between the carrier and the employees thereof."

Section 2, 45 U.S.C. § 152 Third, provides in pertinent part that

> "... [r]epresentatives, for the purpose of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives...."

STATEMENT OF THE CASE

This case involves a trusteeship imposed in 1986 by the Air Line Pilots Association, International ("ALPA").

The trusteeship was imposed against a subordinate unit of ALPA referred to as the Air Wisconsin Master Executive Council ("MEC") and against the chief officers thereof, who were removed from office at the same time.

The trusteeship was imposed in November 1986, several months after a group of Air Wisconsin pilots had unsuccessfully attempted to replace ALPA as the bargaining representative for Air Wisconsin pilots. (A-19.)

The plaintiffs in this action include James M. Fenske, Chairman of the MEC, and two of the other officers of the MEC elected by Air Wisconsin pilots, Gary M. Pelach, the Secretary-Treasurer and Richard J. Magiera, a member of the MEC, all of whom were removed from office by ALPA. (A-13.) Other parties plaintiff include the Air Wisconsin Pilots Protection Committee and Thomas K. Bly, Chairman.

Defendants include ALPA and three of the four trustees who have been appointed by ALPA in succession to replace Fenske as Chairman of the MEC.

During the four-year period of the trusteeship, the trustees exercised dictatorial powers over the functions normally performed by officers of their choice elected by the Air Wisconsin pilots.

An assistant trustee, Ted Fergus, was appointed by ALPA. Although he was an assistant trustee, Fergus filed an affidavit below that strongly objected to the trustee's actions in suppressing the expression of the views of the Air Wisconsin pilots for the purpose of the negotiation of a new collective bargaining agreement. (A-463-470.)

The reason assigned by ALPA for trusteeship was that Fenske, as Chairman of the MEC, had a secret ballot conducted by the Honest Ballot Association, to ascertain the desires of the Air Wisconsin pilots with respect to

a revised seniority list. The revised list would modify a seniority list that had become a part of the collective bargaining agreement as a result of an arbitration conducted in 1985 when a smaller airline, Mississippi Valley, was merged into Air Wisconsin.

The arbitration was an outgrowth of a procedure contained in ALPA's Merger Policies and Related Employee Protective Provisions issued in January 1985. (A-102.)

The arbitration panel, chaired by Rolf Valtin, found that as a group, the Air Wisconsin pilots "... were the older pilots - - both in terms of age and in terms of length of service with their company." (A-139; footnote omitted.)

Nevertheless, the seniority list resulting from the arbitration put Mississippi Valley pilots ahead of more

senior Air Wisconsin pilots as a result of a "job lumping" approach used by the arbitrators. The "job lumping" approach was based upon the differing types of aircraft flown by the respective carriers at the time of the merger. (A-148-149.)

Since the aircraft flown by Mississippi Valley were relatively smaller than those flown by Air Wisconsin, the Mississippi Valley group received a disproportionately large share of captains in the combined work force. The Air Wisconsin pilots therefore received more junior positions than otherwise would have been the case. (A-148-149.)

The arbitration award is dated October 7, 1985. (A-168.)

Following the issuance of the arbitration decision, the resulting

seniority list was incorporated into the new collective bargaining agreement for the merged airlines. (A-16.)

The resulting collective bargaining agreement had a termination date of October 31, 1988. (A-16.)

In the secret ballot conducted by the Honest Ballot Association, the Air Wisconsin Pilots voted 88-25 in favor of adopting a proposal for a revised seniority list that had been developed by the Master Executive Council. The revised seniority list embodied the date-of-hire principle, and was prospective in its application only. (A-20.)

The ballot had been conducted at the specific request of two elected officials of ALPA Local Council 50 on Air Wisconsin. (A-348.)

The trusteeship was imposed on the grounds that such action constituted an effort "to change the final and binding nature of the seniority list resulting from an arbitrated award under ALPA merger policy by a majority vote, conducted outside the auspices of the Association ...." (A-23.)

The district court granted defendants' motion for summary judgment, and dismissed the case. It did so notwithstanding substantial issues of material fact shown in the affidavits filed by plaintiffs. (4a-20a.)

In this defense, Chairman Fenske stated that on two prior occasions in that same year, similar ballots had been conducted, and that he previously had been told by an officer of ALPA "that if we could come up with something that a majority of the pilots wanted,

that the Airline Pilots Association would then stand behind it." (A-350-351.)

In addition, Fenske's affidavit stated that the appointment of a trustee was unwarranted because any future agreement to change the seniority list would have to be signed by the President of ALPA in any event. (A-351.)

Fenske's affidavit also made a showing of shocking violations of his right to a fair hearing when the appeal of his removal and the imposition of the trusteeship reached the level of the ALPA Board of Trustees in October 1988. (A-362-367.)

In addition, the affidavits of Fenske and others showed that ALPA used the trusteeship as a means of influencing the outcome of the representation

election conducted in January 1989. (A-366-369.)

Whereas ALPA had won the 1986 election by 13 votes (A-19), its margin was reduced to five votes by the time of the January 1989 election. (A-461.)

Substantial evidence of acts of interference and intimidation by ALPA to influence the outcome of the election was presented. (A-450-454; 496-499.)

Therefore, since a change in only three votes would have changed the outcome of the 1989 election, it was shown that but for such activities of interference and coercion by ALPA and its trustee, ALPA would have been voted out. (A-450-451.)

The district court incorrectly granted summary judgment on the basis that "in this case Fenske has not been removed" (17a) notwithstanding a clear

showing to the contrary from defendants' own documents. (A-313)

The district court also incorrectly stated, "There is no membership right to vote." (18a.)

As stated above, similar votes on the same subject had previously been conducted on two prior occasions. (A-350.)

In addition, the ALPA Constitution and By-Laws provide that such ballots may be conducted at the "option" of the MEC. (A-78.)

In addition, under the ALPA Constitution and By-Laws, the Air Wisconsin pilots had a clear right to vote for their representatives on the MEC who were removed by ALPA. (A-53, A-56.)

The MEC is a subordinate unit of ALPA established under its Constitution and

By-Laws. The powers of the MEC are broad in scope (A-56):

> C. The Master Executive Council of an airline is empowered to make the final decision on any problem or problems of the members of that airline except as provided elsewhere in the Constitution and By-Laws. The decisions of the Master Executive Council shall be considered as the decisions of the members of the airline and shall be acted upon accordingly. However, nothing in this Section shall authorize any Master Executive Council to initiate any action that is inconsistent with this Constitution and By-Laws or with the best interests of the Association or the general membership."

The decision of the district court in granting summary judgment was affirmed by the Seventh Circuit. The Seventh Circuit ignored the errors of the district court referred to above.

In addition, the Seventh Circuit incorrectly stated (909 F.2d at 214):

"The facts are not in dispute."

As shown below, a substantial number of issues of material fact were in dispute.

Review by this Court is warranted because of the abuse of summary judgment procedures in a case involving important free speech and voting rights guaranteed to union members.

Non-Record Subsequent Developments

It is anticipated that respondents will seek to avert the issuance of a writ of certiorari on grounds of recent developments that are not of record.

It is our understanding that the trusteeship was abruptly terminated on or about October 28, 1990, shortly after respondents became aware on October 20, that petitioners' request for an extension of time within which to file the petition for a writ was extended by an order of Mr. Justice Stevens. (1a.)

The abrupt termination of the trusteeship followed on the heels of the signing of a five-year collective bargaining agreement (two years back, and three forward) negotiated by the trustee and his hand-picked negotiating committee.

Although the contract was called "concessionary," a more apt terminology would be "sweetheart."

The contract is in the nature of "fruit of the poisonous tree" that perpetuates the evils of the trusteeship three years into the future.

Not only is the arbitrated seniority list continued unnegotiated and hence unchanged thereunder, but substantial changes were made by locking in the Air Wisconsin pilots to compulsory, dues-paying provisions under which they are

deprived of their rights under their customary grievance procedure.

ALPA's true motive has become apparent in that it has already used provisions in the new contract as a basis for instituting disciplinary proceedings to harass the Air Wisconsin pilots whose objection to the four-year trusteeship has taken the form of withholding dues on the grounds that they were not being represented by their collective bargaining "agent," but by non-elected trustees.

Further, the claims of the Air Wisconsin pilots for damages as a result of actions in violation of their claim of contractual rights under the ALPA Constitution and By-Laws, and also under the ALPA Merger Policies and Related Employee Protective Provisions continue

unaffected by the dissolution of the trusteeship.

ARGUMENT

I. THE QUESTION OF THE LANDRUM-GRIFFIN RIGHTS OF THE UNION DISSIDENTS WARRANTS REVIEW

The opinion below assumes that, because the Air Wisconsin pilots lost representation elections, they were bad losers not deserving of a judicial remedy under the Landrum-Griffin Act. (909 F.2d at 215.)

It is submitted that, in such circumstances, the intra-union voting and free speech rights guaranteed by the Landrum-Griffin Act are more, not less, important.

The anti-judicial remedy bias inherent in the mindset of the Court is apparent from the language of the Seventh Circuit's opinion. The

"disgruntled" Air Wisconsin pilots, having "struck out ... twice in the electoral marketplace," and "undaunted" by defeat, "refused to call it quits," and instead "turned to the courts" in what the writer of the opinion refers to, with evident distaste, as "the characteristic style of modern Americans ...." (909 F.2d at 215.)

It is submitted that, in our Constitutional system, it is for Congress to say whether the public interest requires a judicial remedy to be made available, and it is not the province of the Courts to erect artificial barriers to such remedies as may be created by Congress in statutes such as the Landrum-Griffin Act, no matter how much individual judges may disagree with the premises of such statutory remedies as may be provided.

Having decided the case on summary judgment, under the strict subjective "intentional violation" standard employed by the Seventh Circuit in Duty of Fair Representation cases ("nothing more is required to comply with the duty of fair representation ... so long as the union does not intentionally harm a member or class of members" [909 F.2d at 216]), the Court apparently was unaware (a) that ALPA is the dominant pilots' union in the airline industry and (b) that pilots in a small feeder airline accordingly would only with great reluctance give up their ALPA membership entree' to high-paying jobs in the majors.

The question of whether Congress intended a judicial remedy to be withheld when a possible electoral remedy could create irreparable injury

of its own because of the existence of a partial labor monopoly is of great importance.

The Seventh Circuit also engaged in circular reasoning in that it chose to give weight to evidence that a motive for the trusteeship was to retaliate against and punish those deemed responsible for the election attempt by an independent union (21a-22a, 26a-27a) and that but for direct interference by ALPA under the auspices of the third trustee put into the position, the independent union would have won the second election (28a.)

The illogic of the Seventh Circuit's view that dissidents vulnerable to a dominant union's power structure are less deserving of judicial remedies that Congress provided in the Landrum-Griffin Act than are victims of other

types of discrimination is readily apparent.

The Seventh Circuit stated, "It cannot be said too often that the judicial remedies available to employees unhappy with their collective bargaining representative are highly limited." (909 F.2d at 217.)

However, that is not what this Court said when it decided Sheet Metal Workers' Association v. Lynn, ___ U.S. ___, 109 S.Ct. 639 (1989), a decision that came down after the two prior Seventh Circuit decisions on which that court principally relied.

Sheet Metal Workers', supra, reinforces the point that a major objective of the Landrum-Griffin Act is insuring internal democracy within unions by protecting the right to

discuss and criticize union policies and leadership.

The Seventh Circuit would neuter the Landrum-Griffin remedies by withholding their availability from subordinate union officials.

Although Sheet Metal Workers' is perfunctorily cited in the opinion (909 F.2d at 219), the statement immediately following -- "but they are not entitled to continue to exercise a trust that they have abused" -- is notably circular. Whether conducting a ballot to ascertain the desires of the membership, in accordance with past practice, and powers conferred by the constitution, is an "abuse" of a trust, or the proper implementation of such a trust, is a matter of serious concern, particularly in light of the Landrum-Griffin Act's express purpose of

"restoring democratic procedures ...." (29 U.S.C. § 462.)

The pertinent question is whether to discuss and debate the proper interpretation of the ambiguous Merger Policies and Related Employee Protective Provisions document issued by ALPA only a short time before, in the beginning of 1985 (A-102), constitutes an "abuse" of the position of a subordinate union official or, instead, an essential part of the functioning of the democratic process itself.

If union policies are not to be evolved through the process of discussion and argument by both union officials and members, just how are they to be evolved is left unanswered by the Seventh Circuit's opinion.

However, the question was not left unanswered in the Sheet Metal Workers'

case. That case holds that the removal of an elected union subordinate union official for exercising his Landrum-Griffin free speech rights to oppose and criticize union policies carried out in the process of a trusteeship violated the Landrum-Griffin Act.

The district court's attempt to distinguish Sheet Metal Workers' on the ground that that case involved free speech on matters "not legitimately related to any union concern" (17a), trivializes the nature of the guarantee of free speech rights, amd mis-reads the purport of this Court's decision.

When the views expressed are related to matters of direct union concern, free speech becomes vastly more important than when they are not.

The district court's attitude is also inconsistent with the language of the

Landrum-Griffin Act that guarantees a member's right to "express any views, arguments, or opinions ...." (29 U.S.C. § 411(a)(2); emphasis added.)

Free speech rights are not worth much if they do not include the right either to debate the proper interpretation or to seek modification of policies unilaterally proclaimed by a union hierarchy. The district court's limitation of free speech to matters "not legitimately related to any union concern" (17a) could hardly have been what Congress intended to protect when it enacted the Landrum-Griffin Act.

II. THE TREATMENT OF AN ARBITRATION AWARD AS AN IMMUTABLE NEGATION OF BARGAINING DUTIES RAISES SERIOUS RAILWAY LABOR ACT ISSUES

Collective bargaining agents are created and given special statutory status for one reason and one reason

only: to engage in collective bargaining.

This was done under the Railway Labor Act for an important public purpose: to avoid interruptions to the services provided by common carriers caused by dissatisfaction with rates of pay, rules and working conditions through collective bargaining. (45 U.S.C. § 152 First.) See Wisehart, "Transportation Strike Control Legislation: A Congressional Challenge," 66 MICH.L.REV. 1697 (1968).

Seniority has long been a central item in labor negotiations, so much so in fact that it has been held to be a "mandatory" requirement of the duty to bargain. J.I. Case v. NLRB, 253 F.2d 149, 153 (7th Cir. 1958).

However, the effect of the decision below is to foreclose forever bargaining

over an arbitrated seniority list that became part of the bargaining agreement following the merger of Mississippi Valley into Air Wisconsin.

It matters not, according to the courts below, that the arbitration award was an ad hoc adjustment based upon the configuration of the fleets of aircraft that existed at that instant of time in a rapidly changing industry. (A-146: "We disregard the parties' respective forecasts for 1986 and beyond ....")

Nor did it matter that the arbitration itself was an "interest" arbitration as opposed to a "rights" arbitration, the end result of which was merely to become part of the collective bargaining agreement. (29a-32a.)

By some mystical process which the Court of Appeals never bothers to explain, unlike every other part of the

bargaining agreement, which can be changed by negotiation, the seniority clause is thereby rendered untouchable in perpetuity because of ALPA's unilateral "policy" declaration that "final and binding" means it is forever released from its bargaining duties to the Air Wisconsin pilots on this one subject that has so devastating an effect upon their future interests throughout the entire work-life expectancies of so many of them. (Fenske Aff., A-360.)

There never has been a decision that exalts an arbitration award to such a sacred status that so transcends the union constitution, the collective bargaining agreement even the collective bargaining duty that is central to the statutory scheme of the

Railway Labor Act. (45 U.S.C. § 152 First.)

Further, the Monday morning quarterbacking attitude of the Court of Appeals, such a weird result should have been foreseen by the Air Wisconsin pilots, and they should have sued to upset the arbitration on some such extreme grounds as "fraud" (909 F.2d at 216), rather than relying on the common sense assumption that the end product of the arbitration -- a clause in the new bargaining agreement for the merged airline -- would be treated no differently than the other clauses therein and, like them, would be subject to negotiation for future application when the opportunity rolled around.

The Seventh Circuit's statement that "There is no way in which ALPA's interpretation of the provisions

bearing on the merger of seniority lists could be thought unreasonable" (909 F.2d at 218) is out of touch with the realities and practice of collective bargaining insofar as it involves "interest" arbitrations, as shown in the affidavit of Thomas K. Bly. (A-445-449.)

In the Steelworkers Trilogy, this Court held that "rights" arbitrations play an important part in the collective bargaining process. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). See also Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

However, this Court has never held that an arbitration award --

particularly one resulting from a non-statutory arbitration as here involved -- would be permitted to supersede a collective bargaining agent's statutorily imposed bargaining duties on a permanent basis.

Such a result would be an anomaly with regard to an "interest" arbitration award that becomes a part of the bargaining agreement itself.

The distinction between interest and rights arbitrations is described in Elkouri & Elkouri, How Arbitration Works, Chapter 3, in which it is pointed out that interest arbitrations are "quasi-legislative" in nature because they are not grounded in the interpretation of a bargained-for agreement.[2]

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[2] Elkouri & Elkouri, How Arbitration Works (1985-87 Supplement) (Washington, D.C.: BNA, 1988), p. 23.

The result of the decision below is to permit the circumvention of the performance of bargaining duties on a permanent basis based upon a "policy" unilaterally adopted by the union's hierarchy. Such a result is of grave importance to the proper performance of the duty of collective bargaining as mandated by the Railway Labor Act, see Virginian Railway Co. v. System Federation No. 40, 330 U.S. 315 (1937), and well worthy of this Court's attention.

III. THE SEVENTH CIRCUIT'S "INTENTIONAL VIOLATION" STANDARD CONFLICTS WITH THE LESS RESTRICTIVE STANDARD FOLLOWED BY ALL OTHER CIRCUITS IN DFR CASES

The Seventh Circuit has long held that the duty of fair representation is enforceable only in "intentional misconduct" cases, a limitation that has

given the Seventh Circuit itself difficulty.

As noted in a recent Seventh Circuit decision on the subject, Thomas v. United Parcel Service, Inc., 890 F.2d 909, 922, fn. 5 (7th Cir. 1989):

> "Ours is the only circuit to require proof of intentional misconduct."

The footnote continues with citations to decisions in the Ninth, Sixth, Eleventh, Fourth, Third, Fifth, Second, Eighth, D.C., Tenth, and First Circuits, all approving a standard less restrictive than the subjective "intentional misconduct" standard used in this case. (909 F.2d at 216.)

The majority opinion in Thomas obviously regarded the Seventh Circuit's rule in DFR cases to be out of step with Vaca v. Sipes, 386 U.S. 171 (1967), and decisions in other circuits,

but felt constrained to follow the restrictive decisional law as it has evolved in the Seventh Circuit.

The application of the Seventh Circuit's intentional misconduct standard in the context of a summary judgment motion proved to be lethal to plaintiffs' case. It is submitted that the decision of the Seventh Circuit conflicts with the cases decided in other circuits both on the appropriate DFR standard and on the use of summary judgment in such cases.

Performance of the Duty of Fair Representation is of particular importance with regard to the issue of seniority.

Seniority is an issue that is uniquely within the province of the union.

Thus if the union abdicates its function, rather than performing its mandatory statutory duty to bargain, the affected employees are bereft of one of the principal responsibilities for which they are compulsorily required to pay union dues to a bargaining "agent" for representing them.

In such circumstance, "... the individual employee stands alone against a single entity: the joint union/employer." Breininger v. Sheet Metal Workers' Int'l Ass'n Local Union No. 6, ___ U.S. ___, 110 S.Ct. 424, 437 (1989).

The premise of the non-performance of such a mandatory duty inevitably will create enormous dissatisfaction and unrest in the workplace, a consequence that is particularly serious when it involves an airline in view of safety

considerations. (45 U.S.C. § 152 First.)

The President of Air Wisconsin stated at his deposition that he had told the pilots in substance that he wanted them to come up with some revisions in the arbitrated list in the bargaining agreement "before all-out war breaks out ...." (A-427-428.)

The desire of the Air Wisconsin pilots for negotiations on the subject of seniority also finds substantial support in the relevant documents promulgated by ALPA itself. These include the Constitution and By-Laws as well as the Merger Policies and Related Employee Protective Provisions issued by ALPA in 1985.

The Constitution and By-Laws lists as one of the union's fundamental objectives the establishment of "...

uniform principles of seniority for members of the Association ...." (Art. I, Section 6(F); A-41.)

The Constitution and By-Laws specify that it is a responsibility of the union "to seek the adoption and perpetuation thereof." (Art. I § 6(F); A-41.)

The Merger Policies and Related Employee Protective Provisions document states that seniority of pilots is to be based upon "the length of service of a pilot with the company." (Section 45.02.01(B); A-113.)

It is further provided that the "Home Office" of ALPA "... is instructed to use every means at its command in standardizing for prospective application" the seniority clause of "all pilot working agreements." (Section 45.02.01(C); A-113.)

Thus rather than supporting the position of ALPA that, in view of the arbitration decision, it will never do anything further on the subject of seniority in representing the Air Wisconsin pilots, the language of ALPA's own documents would lead a "reasonable person" to conclude that, based upon the clear discrepancy between the arbitrated list and the "length of service" principle, more remains to be done in the forum of collective bargaining.

Nor is the duty thus imposed upon ALPA inconsistent with the arbitrated list that became a part of the first merged working agreement.

The arbitrated list, as pointed out above, had no life of its own beyond the term of the collective bargaining agreement. The duty imposed by the ALPA Merger Policies and Related

Employee Protective Provisions does not look backward but instead quite specifically makes reference to negotiating forward "for prospective application" a "length-of-service" seniority clause in "all pilot working agreements." (A-113; emphasis added.)

The supposition, implicit in the decisions below, that an arbitration award providing a short-term solution to flight crew assignment problems involving two different aircraft fleets of a merged airline may be used permanently to block collective bargaining concerning one of the most important terms in future contracts is contrary to the principle and purpose of collective bargaining both as it is practiced and as it is enshrined in national labor policy. See Holzhauer, The Contractual Duty of Competent

Representation, 63 Chi-Kent L. Rev. 255 (1987).

The silencing of such a debate regarding competing interpretations of constitutional and related provisions by the removal of and imposition of a trusteeship on subordinate officials elected by the pilots whose interests are directly involved is inherently destructive of the very representational form of union government that the Seventh Circuit's opinion purports to espouse. (909 F.2d at 219.)

ALPA's action discriminated against Air Wisconsin pilots by depriving them of a meaningful right to speak and vote, contrary to decisions in other circuits. Pignotti v. Local 3, Sheet Metal Workers, 343 F. Supp. 236, 242-43 (D. Neb. 1972), aff'd, 477 F.2d 825 (8th

Cir.), cert. denied, 414 U.S. 1067 (1973); Sabolsky v. Budzanski, 457 F.2d 1245 (3d Cir.), cert. denied, 409 U.S. 853 (1972).

Directly contrary to the Seventh Circuit's ruling below is a D.C. Circuit decision, Lamb v. Miller, 660 F.2d 792, 794 (D.D.C. 1984).

Lamb v. Miller holds that removal of a local union official for his continuing opposition to what are stated to be the policies of the international is violative of the Landrum-Griffin Act.

Lamb v. Miller also holds that summary judgment was improperly granted because of the existence of dispute fact issues on the subject.

The decision below therefore is inconsistent with Lamb v. Miller in two important respects.

Especially when good faith is in question in such cases, as it is here, a court must refrain from granting summary judgment. Hotel & Restaurant Employees & Bartenders v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980).

The Seventh Circuit's comments regarding the functions and role of the Air Wisconsin Master Executive Council, a subordinate unit of ALPA, itself gives rise to the interpretation of ambiguous provisions in the Constitution that should have precluded summary judgment.

The Seventh Circuit's opinion fails to consider the plain statement in the Constitution that, subject to certain exceptions, the Master Executive Council of an airline "is empowered to make the final decision on any problem or problems of the members in that airline, except as provided elsewhere in the

Constitution and By-Laws." (Art. IV, § 2C; A-56.)

The Constitution also provides that "The decisions of the Master Executive Council shall be considered as the decisions of the members of the airline and shall be acted upon accordingly." (Art. IV, § 2C; A-56.)

The Seventh Circuit's denial that the Air Wisconsin pilots had any right to be heard on the subject of seniority through the voting of a secret ballot, as their elected representatives had requested, is similarly inconsistent not only with the Constitution and By-Laws of ALPA, but also with the theory of representative government which the Seventh Circuit's opinion endorses.

ALPA's Constitution and By-Laws create a membership right to vote upon "Any contract, letter of agreement, or

letter of understanding that, in the opinion of the MEC, substantially affects the pay, working conditions, career security of pilot members ...." (Art. XVIII § 2B; A-78; emphasis added.)

The Seventh Circuit's statement about representative democracy in the next-to-last paragraph of its opinion totally confounds the true nature of representative democracy, under which the powers flow up from those who are represented, and from whom all powers are ultimately derived, rather than, as in the case of a dictatorship, from the top down.

Trustee Hale frankly admitted that he had blocked the right of the MEC to use the roll-call voting procedure specifically provided by the Constitution and By-Laws for the choice

of the members of the all-important Negotiating Committee. (A-321b.) Trustee Hale himself, of course, was not elected, but appointed. Thus the action of the various non-elected trustees in appointing members of the negotiating committee meant that the process did not constitute the working of true representative democracy, as stated by the Seventh Circuit's opinion (909 F.2d at 219), but its obverse.

IV. THE USE OF DRASTICALLY DIFFERENT RULES OF INTERPRETATION OF THE CONTRACTUAL RIGHTS OF UNION MEMBERS, AS OPPOSED TO OTHER PARTIES LITIGANT, WARRANTS REVIEW

This Court has held that union members may have enforceable contract rights against the union itself arising from the union constitution and related documents. Plumbers & Pipefitters v.

Local 334, Plumbers & Pipefitters, 452 U.S. 615, 619 (1981).

However, in Pipefitters, the Court specifically declined to decide what standard should be used by courts to interpret the contractual rights of members arising from a union constitution or by-laws. (452 U.S. at 627.)

Since Pipefitters, some courts--including the Seventh Circuit -- have failed to realize that claims by union members alleging breach of a union constitution or by-laws are essentially breach of contract actions and have mechanically applied pre-Pipefitters criteria to post-Pipefitters suits.

Rather than applying the rules of contract interpretation that courts would apply to any other breach of contract action, these courts, including

the decision below (909 F.2d at 218), have relied upon pre-Pipefitters cases and their progeny for the proposition that courts should defer to the interpretation of union constitutions by the group in power in the union, no matter how self-serving such an interpretation may be.

Such an approach effectively negates the jurisdiction of the courts to provide a remedy for breach of contract claims.

See Perry v. International Longshoremen's Assn., 638 F. Supp. 1441, 1446 (S.D.N.Y. 1986).

The Seventh Circuit drastically departed from the standard rules of interpretation applied to contractual rights of parties litigant generally in its evaluation of the contractual claims of the plaintiffs below in two respects.

* First, the Seventh Circuit applied the rule that such contractual claims of union members should be denied unless the interpretation given by the hierarchy to the constitution, by-laws, and other promulgations by the union is "unreasonable" and "perhaps even 'patently unreasonable.'" (909 F.2d at 218.)

Such a rule of interpretation is diametrically opposed to the usual rule of contract interpretation under which the meaning of the words used is resolved against the party from which the document emanated, and in favor of the other party, or the promisee. 4 Williston on Contracts, § 621 (3d ed. 1961).

As stated in the Restatement of Contracts 2d § 206:

> Interpretation Against the Draftsman

> In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

The Seventh Circuit's decision turns the normal rule used in interpreting contractual rights topsy-turvy.

Under the Seventh Circuit's decision, the language is interpreted in favor of the officialdom that wrote the document on which the claims are based, and against those to whom the promises were made.

Pragmatically, the language used should have been regarded as comparable to that of an insurance policy in terms of the relationship between the source of the language, the ALPA headquarters that was responsible for preparing it, and the individual Air Wisconsin pilots to whom the language was subsequently

issued in the form of assurances that they relied upon in paying their dues.

That being the case, it is fundamental that the meaning used is to be construed most strongly against the party using them, instead of in its favor, as in the Seventh Circuit's decision. See 4 Williston on Contracts § 621, pp. 764-5 (3d ed. 1961).

The Seventh Circuit's decision also violates the rule that related provisions appearing together in a document are to be interpreted so as to give effect to both, so that neither clause will be rendered a nullity. 4 Williston on Contracts (3d ed. 1961) § 619, p. 731.

So construed, the "final and binding" provision relating to arbitration awards is interpreted, as it was here in the practice followed by the parties, in

making it a part of the current collective bargaining agreement. Thus there is no necessary conflict between that clause and the prospective duty to bargain regarding seniority in the negotiation of <u>future</u> agreements as the "Home Office" is directed to do by a separate but related provision in the same document. (A-113.)

In the second place, the interpretation of ambiguous language has been repeatedly held to be a fact issue precluding summary judgment in other circuits, including the Second.

As stated in the recent case of <u>Record Club of America v. United Artists Records</u>, 890 F.2d 1264, 1270-1271 (2d Cir. 1989):

> "Summary judgment as to the meaning of a contract term may not be granted when the term's meaning is not clear or is reasonably susceptible to more than one interpretation. 'Where contract

> language is ambiguous, the differing interpretations of the contract present a triable issue of fact. Summary judgment is therefore inappropriate.' [Citations omitted.]"

The Seventh Circuit's opinion virtually concedes that the language is ambiguous. It emasculates the "goal" that the ALPA constitution sets forth regarding seniority by calling it "preamble-like." (909 F.2d at 217.) Then, turning to the policy statement issued by ALPA dealing specifically with mergers and related pilot protective provisions, it acknowledges that it specifically provides that "seniority as a pilot shall be based upon the length of service as a pilot with the Company," but disregards this as also being "preambular" (909 F.2d at 218) and also ignores the direction given to the Home Office for prospective application in future agreements referred to above.

Whether the provisions to be interpreted are "preambular" as opposed to enforceable is a question of fact that should have precluded summary judgment.

Further, when direct evidence of personal malice is presented, as here, in the affidavits claiming that the trusteeship was imposed in retaliation for the attempt by Fenske, Jakawich and others to set upon an independent union (21a-23a) the assumption that the result was the outcome of a "reasonable interpretation" as opposed to being the outgrowth of other factors is a fact issue not determinable on summary judgment.

Curiously, the cases relied on by the Seventh Circuit to support its claim that deference should be given to the union's interpretation of contractual

rights emanating from its own documents (909 F.2d at 218) -- Local Union No. 657 v. Sidell, 552 F.2d 1250, 1257 (7th Cir. 1977), Millwright Local No. 1079 v. United Brotherhood of Carpenters & Joiners, 878 F.2d 960, 962 (6th Cir. 1989), Loretangeli v. Critelli, 853 F.2d 186, 192 (3d Cir. 1988), and Newell v. International Brotherhood of Electrical Workers, 789 F.2d 1186, 1189 (5th Cir. 1986) -- all indicate that, contrary to the result below, summary judgment may not be granted when there are material issues fact in dispute with regard to such interpretation, as are here presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 26, 1990

Respectfully submitted,

WISEHART & KOCH

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90-842

(2)

Supreme Court, U.S.
FILED
NOV 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

vs.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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34

TABLE OF CONTENTS FOR APPENDIX

	Page
Order of the Supreme Court of the United States, dated October 20, 1990	1a
Judgment of the United States Court of Appeals for the Seventh Circuit, dated July 30, 1990	2a
Judgment of the United States District Court for the Northern District of Illinois, dated May 30, 1989	3a
Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, dated May 26, 1989	4a
Pertinent Portion of Plaintiffs' Statement of Genuine Issues Necessary to be Litigated, dated February 21, 1989	21a
Pertinent Portion of Affidavit of Thomas K. Bly, dated February 9, 1989	24a
Pertinent Portion of Affidavit of James A. Jakawich, dated February 8, 1989	26a
Pertinent Portion of Affidavit of John W. Whittlesey, dated February 8, 1989	29a

SUPREME COURT OF THE UNITED STATES

No. A-304

Air Wisconsin Pilots Protection Committee, et al.,

Petitioners

v.

Clifford R. Sanderson, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 27, 1990.

/s/John Paul Stevens

Associate Justice of the Supreme Court of the United States

Dated this 20th day of October, 1990.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: July 30, 1990

BEFORE: Honorable Richard A. Posner, Circuit Judge

Honorable Joel M. Flaum, Circuit Judge

Honorable Michael S. Kanne, Circuit Judge

No. 89-3350

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Plaintiffs-Appellants

v.

CLIFFORD R. SANDERSON, Trustee and Acting Chairman of Air Wisconsin Master Executive Council, AIR LINE PILOTS ASSOCIATION INTERNATIONAL, WILLIAM P. HALE, Trustee and DENNIS HIGGINS, Trustee,

Defendants-Appellees

Appeal from the United States District Court for the Norther District of Illinois, Eastern Division
No. 87 C 3382, Judge James B. Zagel

The cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, et al

v.

CLIFFORD R. SANDERSON, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 87 C 3382
Judge Zagel

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, the defendants' motion for summary judgment is granted.

Date: May 30, 1989

H. STUART CUNNINGHAM
Clerk

*/s/*Don Walker
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA, and THOMAS K. BLY,	)	NO. 87 C 3382
Plaintiffs,	)	HONORABLE JAMES B. ZAGEL
CLIFFORD R. SANDERSON, Trustee, and Chairman of AIR WISCONSIN MASTER EXECUTIVE COUNCIL; and AIR LINE PILOTS ASSOCIATION INTERNATIONAL,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs,[1] pilots employed by Air Wisconsin, Inc., (ARW or Air Wisconsin), are dissatisfied with their collective bargaining representative, the Air Line Pilots Association, International (ALPA). ALPA is, and was at all times relevant to this litigation, the certified collective bargaining representative under the Railway Labor Act (RLA), 45 U.S.C. sec. 151 *et seq.*, for the pilots employed by Air Wisconsin. After failing to obtain their desired relief from the National Mediation Board plaintiffs bring their grievances to federal court. Plaintiffs complain that ALPA

[1] Plaintiff, Air Wisconsin Pilots Protection Committee (AWPPC), is an association whose membership consists of many Air Wisconsin pilots. James M. Fenske is a pilot for ARW, Chairman of the Master Executive Committee (MEC) established by ALPA, and a member of the AWPPC. Gary M. Pelach is a pilot for ARW, Secretary-Treasurer of the MEC and a member of the AWPPC. Richard J. Magiera is a pilot for ARW as well as a member of the MEC, Local Council 50 and the AWPPC. Thomas K. Bly, a pilot for ARW, is Chairman of AWPPC and a member of Local Council 50. Plaintiffs are referred to collectively as AWPPC.

violated its duty of fair representation by refusing to revise the arbitrated seniority list as requested by the AWPPC, that the imposition of the trusteeship violated Title III of the Landrum-Griffin Act and that certain defendants breached their fiduciary obligations. Defendants[2] seek summary judgment in their favor. On May 5, 1989, oral arguments were presented before this court on the Summary Judgment Motion.

I. FACTS

A. *The Seniority List*

This litigation arises out of the May 1985 merger of Air Wisconsin with Mississippi Valley Air Lines, Inc. (MVA). MVA pilots were also represented by ALPA. Mergers are frequent in the air travel industry, and ALPA has established a merger policy set forth in a document entitled "Merger Policies and Related Employee Protective Provisions of January 1985" (Merger Policy).[3] One question which must be resolved when airline companies merge is how to integrate the seniority lists of the carriers; this is a significant concern and close to the hearts of the pilots because seniority affects such issues as the pilot's job security, route assignment and equipment. ALPA's Merger Policy establishes a set of seniority integration procedures and guidelines which were applicable to resolution of the pilot seniority issues arising in this case.

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[2] On September 2, 1987, Air Wisconsin, Inc. was dismissed as a defendant because it was neither a necessary nor indispensable party. The remaining parties are: ALPA; Clifford Sanders, a United Airlines Pilot, who was appointed by ALPA as Trustee and Acting Chairman of the Air Wisconsin Master Executive Council; William P. Hale, who succeeded Sanderson as Trustee; and Dennis Higgins, who succeeded Hale. Defendants are referred to collectively as ALPA.

[3] The Merger Policy was formed by the ALPA Board of Directors and the ALPA Executive Board, the governing bodies of ALPA, who under ALPA's Constitution and Bylaws have the powers to establish policy for ALPA. Plaintiffs do not contest the authority of these bodies to form policy.

When the representatives of the pilot groups were unable to resolve the seniority issues through direct negotiations, they proceeded to arbitration.[4] The integration of the pilot seniority lists was resolved by the Arbitration Board chaired by Arbitrator Rolf Valtin. According to the Merger Policy the arbitration award, here the Valtin Award, is final and binding on all parties and must be defended by ALPA (Merger Policy para. G-8 (Sec. 45.01.04)). A number of pre-merger ARW pilots were unhappy with the Valtin Award, they felt that pre-merger MVA pilots received higher seniority status than a number of pre-merger ARW pilots, thus depriving ARW pilots of the benefits to which they were entitled.

These pilots, including plaintiffs, attempted, on several occasions, to have the arbitrated seniority list changed to reflect length of service, although they had failed to achieve this at the arbitration proceeding. Plaintiffs sought reconsideration of the Valtin Award, which was not granted. A number of ARW pilots sought to form a voluntary association named North American Pilots Association (NAPA) to replace ALPA as their bargaining representative.[5] On October 3, 1986, the Air Wisconsin Master Executive Council (MEC) met to consider the seniority problem because the former MVA pilots refused to modify the arbitrated seniority provisions that were incorporated in the collective bargaining agreement.[6] On October 6, 1986, Plaintiff Fenske,

---

[4] Pursuant to the Merger Policy, two pilot merger representatives are chosen from each ALPA represented pilot group to negotiate an integrated seniority list. If they are unsuccessful in direct negotiation, arbitration is mandatory. (Merger Policy para. G-1 at 6 (Sec. 45.01.04).) An arbitration proceeding to integrate the seniority list is held before a neutral arbitration board, and the only parties are the pilot groups. In addition, in this case, the parties entered into a "fence agreement" providing for an arbitrated, integrated seniority list in the event that the representatives of the two groups could not reach an agreement.

[5] On May 12, 1986, in a representation election held by the National Mediation Board in accordance with the RLA, the ARW pilots voted to retain ALPA as their certified representative. *Air Wisconsin, Inc.*, 13 NMB 231 (1986).

[6] ALPA's internal structure is established by its Constitution and Bylaws. For each ALPA represented airline there are established Local Councils and a

(Footnote continued)

Chairman of the MEC, acting on a petition of Local Council 50 representatives, sent a letter to all Air Wisconsin pilots enclosing an "adjusted length of service seniority list proposal" and a secret ballot which asked recipients to mark whether or not the proposed seniority list should be adopted. The letter indicated that if a majority of the ballots affirmed the proposal it would pass.[7] On October 16, ALPA's national secretary, Charles J. Pierce, sent a letter to Fenske stating the mailing to Air Wisconsin pilots constituted an attempt to change the arbitrated seniority list in contravention of ALPA policy. Pierce directed Fenske to impound the ballots without counting them. ALPA's President, Henry A. Duffy, also wrote to Fenske reiterating Pierce's directive and warning that failure to comply would warrant consideration of whether a trusteeship should be imposed under Article XIX of ALPA's Constitution and Bylaws. Despite these warnings the ballots were counted, and it was reported to the MEC that the tally was 85-22 in favor of the resolution.

After a trusteeship was imposed on the MEC, the Committee adopted a resolution that sought to have ALPA "withdraw the proposed imposition of a trusteeship and to have ALPA sign a letter agreement with Air Wisconsin amending the Air Wisconsin contract and seniority list . . ." (Complaint, para. 40.) ALPA's President Duffy refused to sign the proposed agreement revising the seniority list set forth in the arbitration award. On January 17, 1989, the National Mediation Board conducted another ballot election in which the Air Wisconsin pilots rejected plaintiffs' attempt to replace ALPA as the exclusive bargaining representative of the pilots with another organization sponsored by plaintiffs.

Master Executive Council. In 1986, following the merger of ARW and MVA, two Local Councils existed at Air Wisconsin, Local Council 50 (consisting of primarily pre-merger ARW pilots) and Local Council 21 (consisting of mainly pre-merger MVA pilots). There was also an Air Wisconsin MEC with two representatives from Local Council 50 and two from Local Council 21.

[7] According to plaintiffs this ballot was not for purposes of contravening ALPA policy, but was merely for the purpose of soliciting views on the issue of seniority for future guidance.

B. *The Trusteeship Proceedings*

On October 27, 1986, ALPA President Duffy noticed charges against Air Wisconsin MEC members and officers (including plaintiffs Fenske, Pelach and Magiera) and notified them that the ALPA Executive Board would convene on November 16 to consider the proposed trusteeship of the ARW Local Council Representatives, the MEC and the MEC officers.

The Executive Board convened as scheduled; plaintiffs received an evidentiary hearing on the charges and were allowed to present a defense.[8] The Executive Board Chairman stated that counsel may be present as an advisor on behalf of any party but would not be allowed to address the body or actively participate in the hearing. Plaintiffs Fenske, Pelach and Magiera were present for the MEC. ALPA's Secretary Pierce presented the case on behalf of ALPA. On November 19, the Executive Board adopted resolutions to impose a trusteeship on the ARW MEC and Local 50 to remove plaintiffs from their ALPA positions as officers or representatives.[9] The Executive Board found that plaintiffs' efforts to change the arbitration award issued under ALPA's Merger Policy violated ALPA Policy. To allow such action would enable the larger pilot group in a merger to disregard the rights of the smaller pilot group. The decisions of ALPA's President and Executive Board regarding the trusteeship were affirmed by ALPA's Board of Directors in October, 1988.[10]

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[8] Article XIX of the ALPA Constitution authorizes the President of ALPA, with the approval of the Executive Board, to impose a trusteeship on an MEC or Local Council and to remove any of the officers or representatives for violation or failure to comply with any of the provisions of ALPA's Constitution and Bylaws or policies. The procedural requirement for notice and a fair hearing before the Executive Board when a trusteeship is under consideration is also set forth in Article XIX.

[9] The Executive Board found that the Council 21 representatives did not participate in the actions requiring corrective action and did not impose a trusteeship over that council. There is no longer a trusteeship over Local Council 50, it was lifted once ALPA's President found that it could run its own affairs.

[10] The Board of Directors is ALPA's highest governing body. Pursuant to Article VII, Section 2, its interpretation of the Constitution and Bylaws governs ALPA in the conduct of its business and affairs.

Captain Clifford R. Sanderon, a United Air Lines pilot, Executive Vice-President of ALPA and Chairman of the United Air Lines ALPA Local Council based in Chicago, was appointed Trustee for the ARW MEC by the Executive Board. The continuation of the trusteeship was considered at each regular meeting of ALPA's Executive Board, and in each case the Executive Board resolved to keep the trusteeship in effect.[11] President Duffy replaced Trustee Sanderson with Captain William P. Hale, a current and pre-merger Air Wisconsin pilot. Upon his resignation he was replaced by Dennis Higgins of ALPA's national organizing department.

II. DISCUSSION

A. *Summary Judgment Standard of Review*

A motion for summary judgment should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All facts and inferences must be viewed in the light most favorable to the party opposing the motion. The moving party has the burden of proving that there is not an issue of material fact requiring a trial. *Adickes v. S. H. Kress & Co.*, 90 S. Ct. 1598, 1608 (1970). A successful opposition to a summary judgment motion, however, requires that the nonmovant provide specific fact supporting the existence of a genuine issue of material fact for trial. *Anderson v. Liberty*, 106 S. Ct. 2505 (1986).

B. *Duty of Fair Representation*

Plaintiffs claim that defendants violated their duty of fair representation because they refused to renegotiate the arbitrated seniority list to reflect the wishes of the Air Wisconsin pilots represented by ALPA. This refusal, according to the AWPPC, is inconsistent with ALPA's established policy, and thus constitutes another violation of their duty of representation.

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[11] According to defendants the continuation of the trusteeship was reviewed at meetings in May and November, 1987 and May and September, 1988.

1. ALPA's Duty

The statutory duty of fair representation is a judicially created rule developed in the 1940's in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the RLA. *Vaca v. Sipes*, 87 S. Ct. 903, 910 (1967); *Steele v. Louisville*, 65 S. Ct. 226 (1944). The duty of fair representation protects individuals – denied their traditional forms of redress by the provisions of federal labor law – from arbitrary union conduct. *Vaca*, 87 S. Ct. at 912. Under the rule the union, which has the statutory authority to represent the members of a given unit as an exclusive bargaining representative under the RLA, is obligated "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 910. The Supreme Court's interpretation of the duty of representation, however, grants bargaining representatives broad discretion because, frequently, decisions which disparately affect union members cannot be avoided. *Ford Motor Co. v. Huffman*, 73 S. Ct. 681, 338 (1953) ("[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . ."); *Zipes v. Trans World Airlines. Inc.*, 846 F.2d 434 (7th Cir. 1988). Thus the Seventh Circuit has limited suits for breach of the duty of representation to instances of intentional misconduct by the union. *Dober v. Roadway Exp., Inc.*, 707 F.2d 292, 294 434 (7th Cir. 1983). *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (1981).

Plaintiffs assert that ALPA's failure to renegotiate the seniority list to reflect the wishes of the alleged majority of ARW pilots violates the duty of fair representation. If all that is required of ALPA is to effectuate the desires of the majority, the intricacies of the collective bargaining process frequently would be superfluous, often all that would be necessary is an organized vote of the employees and a representative to confer with the employer. Contrary to plaintiffs' contention, the duty of fair representation does require acknowledgment of the minority position. *Dober*, 707 F.2d 292, 295 (duty of fair representation provides some protection to minority from oppression by the majority); *Alvey v. General Electric Co.*, 622 F.2d 1279, 1289 (7th

Cir. 1980) (a union cannot accede to the will of the majority if to do so would result in arbitrary, discriminatory or bad faith disregard for the rights of the minority). Thus, if ALPA had changed the seniority list after it had been developed pursuant to their Merger Policy and after arbitration, ALPA could have been guilty of arbitrary conduct and discrimination against the minority in violation of the duty of fair representation.[12] Plaintiffs' claim that ALPA violated its duty because it failed to effectuate the will of the majority has no basis in law.

2. ALPA's Merger Policy

Plaintiffs argue that ALPA violated its own stated policies by refusing to revise the seniority list. According to plaintiffs the arbitration award serves only an interim purpose and once it is integrated into the collective bargaining agreement the seniority list is subject to renegotiation. ALPA's refusal to renegotiate the list in violation of its own policy, say plaintiffs, constitutes misconduct in violation of the duty of fair representation. Review of the Merger Policy provides no insight on why plaintiffs conclude that an integrated seniority list is subject to renegotiation. Furthermore this theory does not seem plausible. If the list is subject to renegotiation in the bargaining agreement, then seniority cannot possible afford the security to pilots that makes the seniority list so crucial to the parties in this litigation.

Plaintiffs also argue that the Valtin Award did not conform to ALPA's Merger Policy because it did not establish seniority

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[12] Pursuant to paragraph G-8 of the Merger Policy, ALPA is clearly required to uphold and defend the Valtin Award. (Merger Policy G-8, at 6 (Sec. 45.01.04) ("the Award of the Arbitration Board shall be final and binding on all the parties to the arbitration and shall be defended by ALPA").) Nonetheless plaintiffs assert that failure to "correct" the seniority list constitutes non-action which prejudices the strong interest of employees and it is a violation of their duty. Plaintiffs cite *International Brotherhood of Electric Workers v. Foust*, 99 S. Ct. 2121 (1979), for the proposition that deliberate non-action in the face of a duty to act is a classic example of the breach of the duty of fair representation. This argument must fail; clearly ALPA's duty was to uphold the arbitrated seniority list.

status in accordance with the date of hire of each pilot.[13] Public policy favors private settlement of labor disputes without the intervention of government, and the grounds are very narrow for vacating an arbitration award under federal labor law. *United Paperworkers v. Misco, Inc.*, 108 S. Ct. 364, 370-71 (1987); *Dreis & Krump Mfg. Co. v. I.A.M.*, 802 F.2d 247, 253-54 (7th Cir. 1986). Plaintiffs cite *Beardsley v. Chicago & Northwestern Transportation Co.*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1341 (1989), for the proposition that fair treatment of seniority interests of employees by a bargaining representative is so important that judicial relief is available, even when there has been arbitration. The *Beardsley* court, however, dealt with a limited situation where the arbitration award was vacated because there was an improper arbitration proceeding and the arbitrator acted beyond his authority.

It is true, as plaintiffs assert, that the document which embodies the Merger Policy specifies in the "General Policy" Section, para. B-1 (Section 45.02.01) that with respect to pilots being hired seniority will be based on the "date of hire." This clause refers to pilots' status when hired by the airline, and has nothing to do with the policy regarding seniority lists in the context of a merger. Provisions in the Merger Policy regarding establishment of a seniority list upon merger allow consideration of several factors including date of hire, length of service, type of equipment, number of pilots on furlough, and route structures.[14] We find no basis in the Merger Policy to justify tampering with the arbitrated seniority list.

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[13] A fair representation challenge to an arbitration award must be asserted within six months of the award. *Bonds v. Coca- Cola*, 806 F.2d 1324, 1326 (7th Cir. 1986). The award was rendered in October, 1985. Not only is plaintiffs' claim without merit, it is also time barred by the applicable statute of limitation.

[14] Plaintiffs' argument that date of hire is the only criteria for determining seniority in the merger context means ignoring two specific provisions in the Merger Policy which provide otherwise. Paragraph H-1, at page 6 (Section 45.01.05) of the Merger Policy states that:

(Footnote continued)

Generally the judiciary will refrain from interfering with the internal affairs of the union. *Calhoon v. Harvey*, 85 S. Ct. 292, 299 (1964); *Gustafson v. American Train Dispatchers' Ass'n*, 788 F.2d 1284, 1287 (7th Cir. 1986); *Rota v. Brotherhood of Railway Airline and Steamship Clerks*, 489 F.2d 998, 1003 (7th Cir. 1973), *cert. denied.*, 94 S. Ct. 896 (1974). Judicial intervention in union disputes should be undertaken with great reluctance; consequently, a union's interpretation of its own constitution and bylaws will be disturbed only when it is a patently unreasonable construction of the documents. *Local Union No. 657 v. Sidell*, 552 F.2d 1250, 1257 (7th Cir.), *cert. denied*, 98 S. Ct. 190 (1977). When the Executive Board reviewed the arbitration award issue in November 1986, it found that any effort to change the final and binding nature of the arbitration award violated ALPA's Merger Policy. This ruling was affirmed by ALPA's Board of Directors in October, 1988. Clearly the deference afforded a union's interpretation of its constitution and bylaws extends to ALPA's Merger Policy which was developed by ALPA's Executive Board pursuant to authority under the ALPA Constitution and Bylaws. We defer to ALPA's interpretation of its rules and policies and we find no misconduct on the part of defendants that constitutes a violation of the duty of fair representation.

B. *The Trusteeship*

Plaintiffs contend that the trusteeship over the ARW MEC was imposed in violation of the Labor-Management Reporting

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No inference should be drawn from anything contained in this policy that any one method of integrating the seniority lists is preferable to any other method except that no integrated list shall be constructed which would change the order of the flight deck operating crew members on their own respective seniority lists.

Paragraph F-4 at page 5 (Section 45.01.03) states that in negotiating an integrated seniority list:

. . . merger representatives should consider, but are not limited to, any or all of the following factors in determining a solution: Date of hire, length of service, type of equipment, number of pilots on furlough, route structures and any other factors mutually acceptable to the participants.

and Disclosure Act of 1959 (LMRDA), which governs the establishment of trusteeships by labor organizations. A trusteeship must be established in accordance with the Constitution and Bylaws of the organization which has assumed trusteeship and for ". . . the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organizations." 29 U.S.C. sec. 462.

During the first eighteen months, once a court has concluded that a trusteeship was imposed in a procedurally proper manner, that trusteeship is presumed valid unless it can be proven by clear and convincing evidence that the trusteeship was not established in good faith for a purpose allowable under section 462. 29 U.S.C. sec. 464(c). *See Teamsters Local 406 v. Crane*, 848 F.2d 709, 713 (6th Cir. 1988). After the first eighteen months, the presumption of validity of the trusteeship ceases, and it must be discontinued unless the union can show "by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 462." 29 U.S.C. Sec. 464(c).

If we find that defendants had a legitimate purpose for imposing the trusteeship on the ARW MEC and afforded plaintiffs their procedural rights, then we will not interfere in the internal affairs of ALPA. Defendants' stated purpose for imposing the trusteeship is that the plaintiffs and their sympathizers disturbed ALPA's ability to function properly in its capacity as Air Wisconsin Pilots' collective bargaining representative. This is a permissible purpose for imposition of a trusteeship. *See Teamsters Local 406*, 848 F.2d at 715 (6th Cir. 1988). The pilots had agreed among themselves to abide by an arbitration award if direct negotiations were unsuccessful; plaintiffs should have also been aware that the Union's policy required that ALPA uphold any arbitrated award as final and binding. The facts attest that plaintiffs sought on a continued basis to persuade ALPA officials to revise the seniority list, and plaintiffs made the seniority list a predominate issue at meetings. The ALPA

Board's judgment that the trusteeship was necessary to protect the functioning of ALPA in their capacity as ARW's recognized bargaining representative was proper.

Section 464(c) of the LMRDA provides that for a trusteeship to be valid it must be "established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing . . . before the executive board . . . . " ALPA's Constitution and Bylaws provide that before a trusteeship is imposed the charged party or entity shall be given "written notice of the charges, a reasonable time to prepare a defense and shall be afforded a full and fair hearing before the Executive Board on no less than 20 . . . days written notice." Plaintiffs do not dispute that they were given adequate notice and that a hearing was held; plaintiffs complain that they were denied their procedural rights because they did not have the opportunity to mount a proper defense and they were not permitted to retain counsel on their behalf.

A trusteeship under the LMRDA must comply with fundamental notions of due process, but it need not meet all the requirements of formal judicial proceedings. *See Jolly v. Gorman*, 428 F.2d 960, 967-68 (5th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971); *Hardy v. Int'l Bhd. of Boilermakers*, 682 F. Supp. 1323, 1329 (E.D. Pa. 1988). Plaintiffs do not substantiate their allegation that they were denied sufficient time to prepare their defense with any evidence. Plaintiffs were given the twenty days' notice of charge and hearing as anticipated by ALPA' s Constitution and we have no basis to find that the pilots were not given a fair opportunity to present their case.

Plaintiffs complain that they were prevented from having legal counsel to represent them. Neither the LMRDA nor ALPA's Constitution establish a right to counsel, and the fact that the charged party was not allowed to have counsel present will not render the hearing procedurally defective. *Tam v. Rutledge*, 475 F. Supp. 559, 569 (D. Haw. 1979). *See Curtis v. Int'l Alliance of Theatrical Stage Employees*, 687 F.2d 1024, 1027-29 (7th Cir. 1982) (a member has no right to counsel at a union disciplinary

hearing even where as a result of the expulsion from the union he lost his job, the court of appeals found that "Congress did not expressly include a right to counsel in the Landrum-Griffin Act and the legislative history reveals that the action was deliberate").[15] We find that the trusteeship was properly imposed.[16]

Plaintiffs argue that the trusteeship was not imposed in good faith, and offer two theories to support this claim. First, plaintiffs argue that the trusteeship was unnecessary because before plaintiffs could effectuate any changes they needed President Duffy's signature. This argument is unpersuasive, the trusteeship was imposed because, as the facts show, plaintiffs were deliberately attempting to change the seniority list in contravention of ALPA's clear policy and were generally uncooperative with ALPA.

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[15] Plaintiffs add a new argument in their Response to the Motion for Summary Judgment to show they were denied due process. They argue that the Executive Board is made up of pilot representatives from other ALPA represented airlines who had a "conflict of interest." This claim is not properly pleaded. In any event the Executive Board who heard plaintiffs' case was properly established pursuant to ALPA's Constitution, and there is no evidence presented that any member of the Board acted with undue influence.

[16] In 1987 a complaint was filed with the Department of Labor (DOL), on behalf of Air Wisconsin MEC, contending that the establishment of the trusteeship over ARW MEC violated the LMRDA. The DOL rejected complainant's allegations that a fair and full hearing had not been conducted before the establishment of the trusteeship and found that the hearing complied with the requirements of ALPA's Constitution and the requirements of the LMRDA. The DOL also rejected complainant's argument that the trusteeship was imposed for an unlawful reason and concluded that the trusteeship comported with the purposes of the LMRDA. The DOL refused to review the complaints regarding the trustee because it had no jurisdiction over the conduct of the trustee when no financial mismanagement or election improprieties were alleged. The DOL concluded that their investigation revealed no actionable violation of the LMRDA.

The DOL also dismissed a complaint regarding the administration of the trusteeship in April, 1988. The DOL concluded that its investigation disclosed no violation of the LMRDA which would warrant the DOL's institution of a lawsuit challenging the ARW MEC trusteeship.

Second, plaintiffs claim that the motive behind imposing the trusteeship was to deprive Fenske, MEC Chairman, of his authority. At the oral argument plaintiffs cite to *Lamb v. Miller*, 660 F.2d 792 (D.C. Cir. 1981), for the proposition that if enough evidence of impermissible motivation is shown in the removal of a representative, a factual issue is raised which must be resolved by the trier of fact. *Lamb* involved the suspension of a union representative, in this case Fenske has not been removed, and there is no indication that he is barred from holding any office. In addition, evidence of ALPA's good faith is the fact that they withdrew the trusteeship over Local 50 when they found it was no longer necessary to ensure ALPA's proper functioning. Recognizing the deficiency in their argument plaintiffs provide additional arguments in their Response to the Motion for Summary Judgment to show that plaintiffs acted in bad faith. Plaintiffs now argue that the trusteeship chilled their freedom of speech and denied them their right to vote. These claims have never been pleaded and are not properly before this court. In any event, these claims are without merit.

The LMRDA, 29 U.S.C. sec. 411(a)(2), grants to members of labor organizations the right to express opinions or arguments subject to the union's "reasonable rules as to the responsibility of every member toward the organization . . . and to his refraining from conduct which would interfere with its performance of its legal or contractual obligations." Plaintiffs argue that the October 6, 1986, letter to ARW MEC members was merely a solicitation from the membership of their views regarding the lists, to be used for future guidance, and that by impounding the balloting ALPA chilled membership free speech.

Plaintiffs offer *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 109 S. Ct. 639 (1989), as authority that defendants' conduct was improper. Their reliance on *Lynn* is misplaced. In *Lynn* a local union business agent was removed from office "in retaliation for statements he made at a union meeting in opposition to a proposed dues increase." *Id.* at 641. The Court found that this was a retaliatory removal for Lynn's exercise of his membership right of speech and was not legitimately related to any union concern. *Id.* at 644. Here plaintiff's conduct was in violation

of union rules, and *Lynn* is not applicable. Furthermore, Fenske was not barred from holding any positions and in fact was re-elected as Local Council Representative in March 1988.

Reviewing the facts (in the light most favorable to plaintiff) we can only find that the balloting was an attempt to change the seniority list. Plaintiffs clearly considered it an authoritative ballot and used it to urge a change in the seniority list on several occasions. Therefore, Fenske, when he implemented the balloting procedure under color of his authority as MEC chairman, was in direct violation of ALPA policy. ALPA's Constitution and Bylaws provide that MEC and Local members can be removed for failure to comply with ALPA policies. (ALPA Constitution Art. IV, Section 2.C).

Plaintiffs' contention that they were denied the right to vote because their October 6 resolution was not recognized by ALPA is similarly without support. There is no membership right to vote. Plaintiffs' only possible basis for finding a right to vote is in 29 U.S.C. sec. 411 which provides that where a right to vote is created by the union's constitution or bylaws or by statute, it must be extended on an equal basis among the members. Plaintiffs were not entitled to vote on a referendum which violated ALPA policy.

Having found that the trusteeship was imposed in good faith and pursuant to procedural requirements, we presume it was valid during the first eighteen months; defendants have also provided clear and convincing evidence that the trusteeship was appropriately maintained beyond May, 1988. At regular meetings of the ALPA Executive Board the question of the trusteeship was reviewed, and it was resolved at each meeting that its continuation was essential to ALPA's functioning. We note again that the trusteeship over the Local Council was removed when it was no longer found necessary. Defendants have presented evidence of conduct which jeopardized ALPA's functioning to justify continuation of the trusteeship. Specifically, on March 2, 1988, Plaintiff Fenske, who acted as Local Council representative and MEC member, demanded that Trustee Hale sign the proposed collective bargaining agreement with

ARW changing the seniority list. On March 9, 1988, plaintiffs moved before this court to have Hale added as a defendant to this action because he refused to sign the agreement. The record shows that plaintiffs persisted in their efforts to revise the seniority list by making it a controversial issue which monopolized MEC meetings.[17] The continuation of the trusteeship beyond eighteen months was clearly justified.

C. *Fiduciary Duties*

29 U.S.C. sec. 501(a) charges certain fiduciary duties to the officers and other representatives of a labor organization who occupy positions of trust with respect to the organization and its members. 501(a) requires that such fiduciaries:

> . . . refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization. . . .

Plaintiffs find that defendants breached their 501 duty and provided the following examples: 1) when the Board imposed the trusteeship and refused to represent the wishes of the ARW bargaining unit, 2) the appointment of Trustee Sanderson who allegedly has a conflict of interest because he was a pilot and an officer at a competitor airline, United Air Lines, 3) the abrupt resignation of Trustee Hale which was suspect because it occurred at the time Air Wisconsin job opportunities were being usurped by the ALPA unit of United Airline pilots, 4) Trustee Higgins breached his fiduciary duties by impounding a questionnaire sent out by ALPA to ascertain views on renegotiation of the contract, and 5) the misrepresentations by Higgins to ARW pilots regarding the ALPA committee meeting that voted to continue the trusteeship and regarding certain financial matters to

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[17] Defendants cite as an example the MEC meeting on May 3, 1988, where two MEC members and pre-merger ARW pilots by means of a roll call vote procedure purported to pass resolutions revoking certain of Trustee Hale's powers and directing Hale to recommend unconditional removal of the trusteeship at the May, 1988 meeting of the Executive Board.

induce a vote in favor of retaining ALPA as representative. On the basis of the uncontroverted facts we find no substance to plaintiffs' claim of fiduciary breach by Sanderson, Hale or Higgins. The fact that Sanderson was a United Air Lines pilot and an ALPA local official representing certain United pilots during part of the time he was a trustee, in and of itself does not prove that ARW suffered any injury or that there was a conflict of interest. Plaintiffs merely state this conclusory allegation and have not shown any conflict of interest which can be addressed. Sanderson states in his declaration that these facts did not influence him as a trustee, and plaintiffs have not shown otherwise. Similarly plaintiffs' allegations regarding Hale's resignation and Higgins's letter sent during representation elections are conclusory and fail to demonstrate any breach of fiduciary duty.

III. CONCLUSION

Plaintiffs have failed to provide any facts to support the existence of a genuine issue of material fact necessary for trial. As discussed above, there is no basis for plaintiffs' claims that defendants violated their duty of representation, breached their fiduciary duty or imposed a trusteeship unlawfully. The arguments which plaintiffs provide to support their main contention that ALPA was obligated to revise the arbitrated seniority list are primarily conclusory and without merit.

Summary judgment in favor of defendants is granted.

Enter:

/s/James B. Zagel
James B. Zagel
United States District Judge

Date: May 26, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA, and THOMAS K. BLY,	Civil Action 87 C 3382 Judge James B. Zagel
Plaintiffs,	
— against —	
CLIFFORD R. SANDERSON, Trustee, and Acting Chariman of AIR WISCONSIN MASTER EXECUTIVE COUNCIL: AIR LINE PILOTS ASSOCIATION, INTERNATIONAL: WILLIAM P. HALE, Trustee, and DENNIS HIGGINS, Trustee,	
Defendants.	

PLAINTIFFS' STATEMENT OF GENUINE ISSUES NECESSARY TO BE LITIGATED

In accordance with Rule 12(f) of the Rules of this Court, plaintiffs submit this statement of the genuine issues which are necessary to be litigated.

1. There is a disputed issue of fact as to the credibility of the claim by defendant Air Lines Pilots Association ("ALPA"), as set forth in its letter dated November 25, 1986, signed by Henry A. Duffy, President (Complaint Ex. I), that the trusteeship was imposed because it was "necessary" and the statement of the Executive Board in ¶ 11 of the resolutions annexed thereto that "immediate corrective action is necessary ... to assure compliance with [ALPA's] Constitution and By-Laws and policy", etc.

Evidence that said claim was a pretext and that the true motive was retaliation against and punishment of plaintiff Fenske and other Air Wisconsin pilots because Fenske was held responsible by the officers of ALPA for the petitioning for a representation election by an independent union in May 1986 (Complaint ¶ 29) is found in:

(a) The affidavits of Fenske (¶¶ 103-110), Bly (¶¶ 8-11, 13) and Whittlesey (¶¶ 19-20, 23) (i) showing a reasonable basis for Fenske's belief that his actions were in compliance with ALPA's Constitution and By-Laws and policies, and his responsibilities as the Chairman of the MEC, a unit of ALPA for the representation of the interests of the Air Wisconsin pilots, and (ii) that the position of Duffy was at variance with ALPA's well-established seniority policies as well as the free speech rights of the Air Wisconsin Pilots, and the representations under which ALPA originally obtained bargaining rights from an independent union for Air Wisconsin pilots;

(b) The undeniable fact that the document entitled "Letter of Agreement" containing the proposed amendments to the collective bargaining agreement as proffered by plaintiff Fenske and the MEC before the imposition of the trusteeship (Complaint Ex. H) was specifically prepared *for the signature* of Henry A. Duffy as president of ALPA. This meant that at all times Duffy had it in his power to approve or disapprove the proposed document before it could become effective, in his capacity as president of ALPA, as specifically provided in Article XVIII Section 1 of the Constitution and By-Laws. Thus the claim of defendants that the trusteeship for the removal of Fenske and other officers of the MEC was either "needed" or was "corrective action", the only basis permitted for such drastic action under the ALPA Consitution and By-Laws, is false and a sham;

(c) The Jakawich affidavit referring to statements by ALPA officers about Fenske and Jakawich as to the true motive for the punitive actions against them by ALPA, and the retaliatory actions by ALPA against other Air Wisconsin pilots who were identified with the election sought by an independent union, or for exercising their free speech rights (Jakawich Aff. ¶¶ 3, 6, 7-9.)

(d) Other evidence that the acts of the defendants were a pretext to avoid liability in this litigation or the election of an independent union is found in the Fenske Affidavit at ¶¶ 91-101.

2. A further credibility issue is raised as to the claim by defendants that there is a "clear and convincing" need for the continuation of the trusteeship (Defendants' Statement of Material Facts ¶¶ 22-26, 30) and that the continuation of the trusteeship is "warranted" for a "legitimate" object is a pretext and a sham as shown by the further undeniable fact that, in the negotiation of a new collective bargaining agreement at the present time, pursuant to the reopening notice given by Duffy under Section 6 of the Railway Labor Act, Duffy has made it clear that any new agreement would require his signature in order to become effective (Fergus Aff. ¶ 5, Exhibit B to Fergus Aff.). Thus defendants can show no evidence whatsoever, much less the "clear and convincing" evidence required by law, for the continuation of the trusteeship, since the power to approve a new agreement is and at all times has been within the hands of Duffy. The true purpose of the trusteeship and its continuation therefore is and at all times has been to suppress and punish the exercise of the rights of free speech of the majority of the Air Wisconsin pilots who seek thereby to persuade the hierarchy within ALPA that their interests should be listened to and accommodated rather than stifled and suppressed. (Fenske Aff. ¶¶ 103-110.)

AFFIDAVIT OF THOMAS K. BLY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS K. BLY, being duly sworn, deposes and says:

1. I am a plaintiff in the above action and respectfully submit this affidavit on personal knowledge in opposition to defendants' motion for a summary judgment.

2. I am President of the Air Wisconsin Pilots Association and am also a member of the Air Line Pilots Association.

* * * * *

40. In addition, because Leonard is Air Wisconsin's Vice-President of Flight Operations, the "Operation Looking Glass" activities of ALPA designed to harass ALPA's opponents, is particularly prejudicial and injurious because information generated by "Operation-Looking Glass" would be brought to his attention as the Vice-President of Flight Operations of Air Wisconsin.

41. The prejudicial purpose and effect of "Operation Looking Glass" is further shown by the fact that the "Operation-Looking Glass" forms were distributed *only* to pilots favoring ALPA's coercive tactics as a means of intimidating those pilots who seek enforcement of their rights of free speech and freedom of association.

42. Further coercive acts by ALPA involve disciplinary action against James Fenske and James Jakawich infringing such rights, as shown in their affidavits.

43. In addition, defendants have threatened ruinous future assessments in amounts unknown relating to costs of trusteeship, if ALWA should become the bargaining representative. These threats were stated in my presence by Trustee Higgins for the obvious purpose of intimidating and coercing the pilots of Air Wisconsin in their choice of a bargaining representative.

44. Whether Captain Hale resigned as the ALPA trustee because of frustration with ALPA or not, he did state that he would have to do things ALPA wanted him to do that he didn't want to do, and he had to get out, so he resigned as trustee. Also, to my certain knowledge, Captain Hale signed a card calling for a representation election to replace ALPA as bargaining representative at the request of the Air Wisonsin Pilots Association in November 1988.

45. Such acts of defendants including the impounding of ballots and the suppression of responses to questionnaires were in violation of the free speech and other rights quaranteed to Air Wisconsin pilots by LMRDA § 101 (29 U.S.C. § 411 (a)(2) to vote and be heard in the negotiation of a new collective bargaining agreement that will have an important bearing upon their future rights and interests.

For all of the above reasons, the motion of defendants for summary judgment should be denied and this case should be scheduled for an early trial.

Respectfully submitted,

s/s Thomas K. Bly
Thomas K. Bly

Sworn to before me this
9th day February, 1989:

s/s Kirk L. Bigelow
Notary Public

AFFIDAVIT OF JAMES A. JAKAWICH

STATE OF INDIANA)
) ss.:
COUNTY OF ALLEN)

JAMES A. JAKAWICH, being duly sworn, deposes and says:

1. I am a pilot of Air Wisconsin Inc. and respectfully submit this affidavit in opposition to the motion for summary judgment by the defendants in the above-entitled litigation.

2. This affidavit and the statements of fact herein contained are true and correct to the best of my knowledge, information and belief, and are made on the basis of personal knowledge.

* * * * *

6. The reasons given for my suspension (although in violation of my rights under Section 101 of the Labor Management Reporting and Disclosure Act), were a pretext. The ALPA trustee, defendant Higgins in this litigation, told me on November 16, 1988, that my activities involving Horizon were not the real reason that I was thrown out by ALPA; he stated, "You were thrown out because you supported NAPA as an officer of ALPA." NAPA is the independent union of Air Wisconsin pilots now called Air Wisconsin Pilots' Association.

7. Similarly, in November 1988, Captain Doug Tufte, another Air Wisconsin pilot called to inform me that charges had been filed against him by ALPA officials to expel him from ALPA for violations of the ALPA Constitution and By-Laws relating to his support for the Air Wisconsin Pilots' Association. He told me that the offer was made to drop the charges if he would withdraw his support for the AWPA. Again, this widely publicized action was deliberately meant to intimidate supporters of the AWPA.

8. Further evidence of such coercion and retaliation by ALPA and interference with the rights of individuals is shown by the

fact that the secretary of ALPA, Larry Schulte, told me in May 1988, that the general consensus among the officers of ALPA was that James Fenske, plaintiff in this litigation, was responsible for the NAPA (AWPA) movement that challenged ALPA's position as the Air Wisconsin pilots' bargaining representative in May of 1986. Fenske was the MEC Chairman at Air Wisconsin at that time and shortly after the vote, Mr. Fenske was removed from office by ALPA, and in further retailiation the MEC and the local council that supported NAPA (AWPA) were placed in trusteeship, where they remain today as an example of what happens to anyone who challenges ALPA.

9. "Operation Looking Glass" is an onging campaign of coercive surveillance sponsored by ALPA to turn in any Air Wisconsin pilots supportive of AWPA suspected of the slightest infractions. Postcards were selectively distributed only to ALPA supporters in the pilot group for use in reporting information, so it is clear that the surveillance system was discriminatory and designed exclusively to harass and punish AWPA supporters. They were addressed to "Operation Looking Glass" at a post office box in Moline, Illinois and the records at the post office carried ALPA as a recipient. In this manner, selective enforcement of regulations could be used as a tool to blackmail AWPA supporters. (*See* Exhibit C annexed hereto.)

10. During February 1988, I was involved in a situation involving disciplinary action by the company and possible enforcement action by the FAA. Because of my public support for AWPA, numerous individuals from the pilot group contacted both the FAA and the company to turn me in and recommend severe punishment for my incident. This information was reported to me by Gordy Anderson, Director of Operations at Air Wisconsin, and Robert Young of the FAA.

11. In December 1988, Captain Ray Weber, another Air Wisconsin pilot, personally informed me that shortly after an organizational meeting where he expressed support for the AWPA, he experienced vandalism to his automobile in the airport parking lot. He believes that the vandalism was instigated by ALPA and is directly related to his support for the AWPA.

These and other facts are reasons why AWPA narrowly lost the recent representation election. But for such interference, intimidation and coercion by ALPA, AWPA would have won the election. Such actions by ALPA violate the rights of free speech and representation rights of myself and other Air Wisconsin pilots. The trusteeship imposed by ALPA directly infringes those rights.

Respectfully submitted,

/s/ James A. Jakawich
James A. Jakawich

Sworn to before me this
8th day of February, 1989:

/s/ Linda A. Gunsett
Notary Public Linda A. Gunsett

Expiration Date 6-11-91

AFFIDAVIT OF EXPERT WITNESS ON BEHALF OF PLAINTIFFS AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN W. WHITTLESEY, being duly sworn, deposes and says:

1. This affidavit is respectfully submitted in opposition to defendants' motion for summary judgment pursuant to Fed.R.Evid. 702.

2. I am an attorney who has specialized in collective bargaining since 1946. I have been labor attorney for the U.S. Chamber of Commerce; Federal Wage and Salary Stabilization Boards; a labor relations consulting firm; and since 1953, labor attorney for Union Carbide Corporation, then headquartered in New York City. I became Union Carbide's Chief Labor Counsel in January 1971 and continued in that position until September, 1982. Since then I have continued to specialize in matters involving arbitration and collective bargaining. I am currently Chairman of the Business Council of New York's Labor and Human Resources Committee, which develops policy for its business membership in these fields. For many years I was Chairman of the New York - New Jersey Arbitration Group, comprised of specialists engaged in labor arbitration. Also, until recently, I have been of counsel for Wisehart & Koch. At present I am counsel to the firm of Keane and Beane in White Plains, New York. I also have been a consultant to other firms on matters involving collective bargaining and arbitration.

3. I am fully familiar with the practices, custom and usage applicable to both collective bargaining and labor arbitration. I am a labor arbitrator. I both participate in and follow developments in labor arbitration and collective bargaining on a continuing basis. My position with Union Carbide involved

participation in all kinds of collective bargaining matters, both under the National Labor Relations Act and the Railway Labor Act.

4. The contention of defendants in this case amounts to a unilateral declaration that there can be no further collective bargaining by ALPA on the subject of the seniority standing of the pilots employed by ARW and that there can be no change in the seniority of those pilots at any time, regardless of circumstances, because of the effect of a 1985 arbitration award integrating seniority lists at the time of the merger of a smaller airline (Mississippi Valley) into Air Wisconsin in 1985. Therefore, states ALPA, defendants will not bargain over such issues with ARW at any time in the future. (Fenske Aff. ¶¶ 7, 8, 47)

5. It is well settled that the duty to bargain, while it may involve taking firm stands on the part of one or another party to negotiations, does not permit any party by fiat to keep any mandatory subject of bargaining away from the bargaining table, nor does it permit so-called union "policies" unilaterally to mandate such refusal to discuss a subject. Yet this is what defendants threaten to do, and they are asking this Court's support to sustain such an unlawful action.

6. The characterization of the Valtin arbitration award as fixed in the sense that its terms must continue unchanged forever and forever and thus preclude negotiations with respect to the seniority list it covers is false, and completely contrary to custom and usage in collective bargaining and with respect to such awards. (Valtin arbitraton award, Ex. D to Complaint)

7. The Valtin award constitutes what is known as "interest" arbitration. As such, it falls into a different category than grievances involving the interpretation or application of existing agreements.

8. "Interest" arbitration, rather than interpreting rights under an existing agreement, declares new terms for future application in a new agreement. As such, its end product is no different

than an agreement that is arrived at by negotiations in that by custom and usage it is intended and expected that it, too, will be subject to change in the future to reflect changing circumstances.

9. Thus, in accordance with such understanding, custom, and usage, the provisions of the Valtin award were incorporated into and made a part of the 1985-88 ALPA-ARW contract. (1985-88 ALPA-ARW contract, Ex. A to Fenske Aff.)

10. The provisions of the agreement governing expiration and renegotiation, then, as is standard custom, practice and usage, clearly contemplate and expect change in any and every section of the contract by negotiated agreement between the parties. As was stated in *The Railway Labor Act at Fifty*, p. 72, published by the National Mediation Board:

> "Section 6 notices in the airline industry normally open the full range of their agreements just as occurs in industry generally, where the entire contract expires."

11. It has been affiant's experience that that statement reflects custom, practice and usage in collective bargaining.

* * * * *

15. The arbitration award was satisfied by its incorporation into Section 12 of the merged working agreement between ALPA and Air Wisconsin. At that point, the jurisdiction of the Valtin Board ceased by virtue of its own statement and by application of the ALPA merger policies above quoted. The "final and binding" characterization of the award became merged into the contract and the provisions of the award, as is custom, practice and usage in interest arbitration, became subject to change *via* mandatory collective bargaining just as any other provision of the ARW-ALPA agreement.

16. Thus the Valtin award was "final and binding" only until it was incorporated in the merged ARW-ALPA bargaining working agreement. At that point, it continued in effect only as part

of that contract and only until the agreement becomes open for negotiation of a new agreement. All of such situations were and are in accordance with law, custom, practice and/or usage in collective bargaining and in the treatment of interest arbitration awards.

(3)

90-842

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

vs.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS FOR SUPPLEMENTAL APPENDIX

Page

Decision of the United States Court of Appeals for the Seventh Circuit, Dated July 30, 1990 ..... 1a

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-3350

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA, and THOMAS K. BLY,

Plaintiffs-Appellants,

v.

CLIFFORD R. SANDERSON, Trustee and Acting Chairman of Air Wisconsin Master Executive Council, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 3382—James B. Zagel, *Judge.*

ARGUED JUNE 14, 1990—DECIDED JULY 30, 1990

Before POSNER, FLAUM, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* Two officers of the Air Wisconsin Master Executive Council, a subordinate body of the Air Line Pilots Association, International ("ALPA"), together with two other Air Wisconsin pilots and an association that these four men have formed called the Air Wisconsin Pilots Protection Committee, have sued ALPA, and several individuals who are agents of ALPA, charging violations of the Railway Labor and Landrum-Griffin

Acts. The individual defendants are trustees whom ALPA appointed to wrest control of the Air Wisconsin Master Executive Council from the plaintiffs. The district judge granted the defendants' motion for summary judgment and dismissed the suit.

The facts are not in dispute. In 1985 Air Wisconsin acquired by merger Mississippi Valley Airlines, a slightly smaller but basically similar airline. ALPA represented the pilots of both airlines in collective bargaining under the Railway Labor Act (which applies to airlines as well as to railroads), and each group of pilots had seniority rights based on the length of their service with their respective airline. The merger of the airlines required merger of the seniority lists. ALPA had previously issued a policy statement to govern the merger of seniority lists of pilots whom it represents. The statement directs each group of pilots to choose two representatives to negotiate the merger of the lists, and if the negotiations break down, as they did here, the dispute is to be submitted to a board of arbitrators whose award "shall be final and binding on all parties to the arbitration and shall be defended by ALPA."

Air Wisconsin's pilots wanted the seniority lists merged on the basis purely of length of service: the pilot hired earliest by either airline would have the greatest seniority in the post-merger Air Wisconsin, the next pilot to be hired by either airline would have the second greatest seniority, and so on down the line. Mississippi Valley's pilots wanted credit for the fact that, before the merger, their airline had been growing more rapidly than Air Wisconsin. The arbitrators split the difference. Their award, set forth in a lengthy document rich in a jargon unfamiliar to us, gave Mississippi Valley's pilots greater seniority than they would have obtained if only length of service had been considered, but less than they had asked for. Some, and probably a majority, of the pilots of the pre-merger Air Wisconsin were unhappy with the award, but none attempted to challenge it in court. Instead, some of them tried to replace ALPA as the collective bargaining

No. 89-3350

representative of Air Wisconsin's pilots with a newly created union, since ALPA was committed by its policy statement to defending the arbitration award. In 1986 the National Mediation Board conducted an election pursuant to the Railway Labor Act to determine whether ALPA or the new union would represent Air Wisconsin's pilots for collective bargaining purposes. A majority of the pilots, presumably composed of a small minority of the pre-merger Air Wisconsin pilots plus an overwhelming majority of the former Mississippi Valley Airlines pilots, voted to retain ALPA.

Undaunted by this defeat, the disgruntled Air Wisconsin pilots decided to change the locus of their struggle to the Air Wisconsin Master Executive Council. ALPA does not have locals, but at each airline that it represents there is a committee, called the Master Executive Council, elected by the pilots of that airline. These committees are subordinate bodies of ALPA. Their powers are defined in ALPA's constitution and by-laws, and are various; for example, a proposal to call a strike may not be submitted to an airline's pilots unless first approved by the Master Executive Council for the airline. But their powers do not include the power to act as collective bargaining representative—ALPA itself is the bargaining representative of the pilots employed by ALPA-organized airlines. And the councils are forbidden to "initiate any action that is inconsistent with the Constitution and By-Laws or with the best interests of the Association or the general membership."

Unheeding of this prohibition the Air Wisconsin Master Executive Council, dominated by pilots of the pre-merger Air Wisconsin, sent a letter to all Air Wisconsin pilots enclosing a proposal to replace the merged seniority list created by the arbitration award with a list based on length of service—just as the representatives of the Air Wisconsin's pilots before the merger had proposed to the arbitrators—plus a secret ballot to be used to vote for or against the proposal. The cover letter stated that the proposal would "pass" if a majority of the ballots "rati-

fied" it. Upon learning of this and related acts of defiance, ALPA placed the Master Executive Council in trusteeship. The suit claims that by thus squelching the Council's attempt to reopen the issue of seniority, ALPA violated its duty (imposed on collective bargaining representatives by interpretation of the Railway Labor Act) to represent Air Wisconsin's original pilots fairly; violated ALPA's constitution, by-laws, and policy statements; and violated the provisions of the Landrum-Griffin Act that govern trusteeships and that guarantee union members the right to vote and the right of free speech.

The suit was brought in 1987, and in 1989 the plaintiffs again failed in their effort to decertify ALPA as the collective bargaining representative of Air Wisconsin's pilots. They thus have struck out not only before the arbitrators but twice in the electoral marketplace. They have refused to call it quits and instead, in the characteristic style of modern Americans, have turned to the courts.

A union empowered by federal law to be the exclusive representative of a group of workers for purposes of bargaining with their employer over wages and over terms and conditions of employment has a correlative duty, fiduciary in character, to represent *all* members of the group fairly, that is, without favoritism, prejudice, or other discrimination. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). ALPA satisfied that duty in this case, however, by establishing, long before the case arose, a fair *process* for determining seniority in an airline resulting from a merger. Representatives of the affected workers negotiate, and if they are unable to come to terms the matter is referred to arbitration. The plaintiffs disagree violently with the result of the arbitration in this case but have not pointed to any features of the process—whether the method of selecting the arbitrators, or their background, or the procedures they employed—as being unfair. More important, ALPA's belief that such arbitrations should be final and binding and its corollary that ALPA shall be obligated to defend them would not have prevented the pilots from challenging the arbitration award in court, if the award were in-

fected by fraud or by a serious conflict of interest or were inconsistent with the terms of reference to arbitration. *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.*, 768 F.2d 914, 921 (7th Cir. 1985); *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers*, 802 F.2d 247, 253 (7th Cir. 1986). (But they mounted no challenge.) ALPA's policy signifies only that if the award is valid, it is definitive so far as ALPA is concerned. The reason for the policy is not hard to see. If ALPA were free to ignore the merged seniority list, the employees of the post-merger airline would have very little job security; as a concomitant, disputes over seniority would fester—as they have done in this case, in which the plaintiffs are indirectly challenging the finality of the merged seniority list.

The system that ALPA has created for determining seniority in a merged work force is not biased in favor of one group of workers or prejudiced against another. It was as likely to yield an award in favor of Air Wisconsin's pilots as in favor of Mississippi Valley's. It is fair, and nothing more is required to comply with the duty of fair representation, since "so long as the union does not intentionally harm a member or class of members, it will be deemed to have represented its members fairly." *Olsen v. United Parcel Service*, 892 F.2d 1290, 1294 (7th Cir. 1990). That the system ALPA has created places a good deal of power in the hand of arbitrators is not a sign of "unfairness" in the limited sense relevant to evaluating claims of breach of the duty of fair representation, especially since the alternative would be to encourage continuing and acrimonious disputes among workers by opening seniority to continual revision. It is not in the interest of organized labor to incite workers to fight among themselves over job rights. Nor is it in the workers' own interest, behind the veil of ignorance, that is, before they know whether they have been the winner or loser of the arbitration. Here as elsewhere finality serves important social purposes and we certainly cannot pronounce ALPA unfair for giving the arbitrators' determination of seniority as much finality as it has done.

The plaintiffs argue with great vigor that since it is a violation of the duty of fair representation to discriminate against a minority, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), it is all the more certainly a violation to discriminate against a majority; the pilots employed by Air Wisconsin before the merger constituted a majority of the pilots of the airline resulting from the merger, and therefore their preference in the matter of seniority should have been honored. With respect, this is a very poor argument. Minority rights imply a limitation on the rights of the majority; hence the latter rights cannot be derived from the former, as the plaintiffs would have us do. What is more, it was the arbitrators, not ALPA, that overrode majority preferences. The system whereby disputes over seniority are referred to arbitration is not slanted against majority preferences except insofar as *any* method of dispute resolution other than majority vote of the disputants may be said to be slanted against such preferences. And it is indeed the *system* for resolving such disputes that the plaintiffs are attacking, or at least should be attacking. If the system is fine and only the specific arbitration award is improper, the plaintiffs are in the wrong forum. They should have challenged the award in court when it was rendered, as in *Beardsly v. Chicago & North Western Transportation Co.*, 850 F.2d 1255, 1270-71 (8th Cir. 1988). As we shall see, such a challenge is now time barred.

It cannot be said too often that the judicial remedies available to employees unhappy with their collective bargaining representative are highly limited. *Antrim v. Burlington Northern, Inc.*, 847 F.2d 375, 378 (7th Cir. 1988); *Dober v. Roadway Express, Inc.*, 707 F.2d 292, 294 (7th Cir. 1983). If the employees don't like the union that represents them, they can vote it out, *id.* at 295, as in fact the plaintiffs in this case have twice tried to do. Majority preferences are secured in this as in many cases by the franchise, *Le'Mon v. NLRB*, 902 F.2d 810, 814 (10th Cir. 1990); *Gorski v. Local Union 134*, 636 F. Supp. 1174, 1181 (N.D. Ill. 1986), making all the more perverse the plain-

tiffs' argument that courts should be quicker to intervene to protect majorities than to protect minorities and inclining us to agree with those courts that have held that the duty of fair representation does not run to the majority. *Le'Mon v. NLRB*, *supra*, 902 F.2d at 814-15; *NLRB v. Local 299*, 782 F.2d 46, 50-52 (6th Cir. 1986).

We do not wish to sound starry-eyed about democracy. We realize that majority rule is not always efficacious and that majority preferences sometimes, perhaps often, are thwarted by the machinations of interest groups; and these and other systemic problems with aggregating preferences by voting are not touched by the efforts of the Landrum-Griffin Act, of which more later, to democratize union governance. But in general, and so far as we know also in the specific setting of collective bargaining representation in the airline industry, a majority is better protected by the electoral process than a minority is. It is therefore the minority that has the more legitimate fear concerning the behavior of the collective bargaining representative. That is why the legal duty of fair representation is oriented toward the concerns of minorities, whether a racial minority systematically discriminated against by the union or a group of dissidents on the outs with the union leadership whom the leadership seeks to punish or an individual worker with a grievance against the company whom the union deliberately and unjustifiably refuses to assist. This case has no flavor of any of these systematic failures of representation. The plaintiffs are unable to explain why, if ALPA is oppressing a majority of Air Wisconsin's pilots, the pilots have twice failed to vote ALPA out as their representative for collective bargaining.

We need not decide whether, if the plaintiffs and their allies ever succeed in ousting ALPA in favor of a union not pledged to defend the arbitrators' award, the matter of seniority can be reopened in collective bargaining negotiations with the airline, or otherwise revisited. The plaintiffs say the award became a provision of the collective bargaining agreement and expired when that agreement

expired. We leave aside the merit of this contention beyond noting that an attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees in the fashion apparently envisaged by the plaintiffs could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool. *Alvey v. General Electric Co.*, 622 F.2d 1279, 1289-90 (7th Cir. 1980).

The plaintiffs' further claim that ALPA has violated its constitution, plus other enactments that give the members contractual entitlements, need not detain us too long. It is true that the constitution sets as a goal for ALPA the adoption of uniform principles of seniority, but this is preamble-like language in a document intended to set forth general principles rather than exact guidelines—a document that does not mention airline mergers at all. The language in question could not have been intended to bar ALPA from using arbitrators to determine seniority in merger situations and giving their determinations finality, especially when elsewhere the constitution empowers ALPA's executive board to interpret the constitution and (what is pretty much the same thing) establish policy for the union. It is true that the policy statement to which we referred earlier states that the "seniority of a pilot shall be based upon the length of service as a pilot with the Company," but this too is "preambular" language and does not appear in the section of the policy statement concerned with the merger of seniority lists when companies merge. The statement's arbitration provision governs there, and it implies that the arbitrators should consider such factors as type of equipment and route structure, along with date of hire and length of service. The directive concerning seniority within each company is intended, as the policy statement elsewhere makes clear, to facilitate the merger of seniority lists by preventing a situation from arising in which as a result of an airline merger a pilot of one of the pre-merger airlines might jump ahead of another pilot *of the same airline* in seniority. It is not intended to dictate the terms on which the lists shall be merged.

No. 89-3350

Despite what we have just said, there might be enough ambiguity in the documents to create a triable issue concerning ALPA's obligations to the employees of the post-merger airline but for two further considerations, each dispositive. The first is the principle that a union's interpretation of its own constitution, by-laws, and other promulgations is entitled to judicial deference; we must be able to call the interpretation unreasonable, perhaps even "patently unreasonable," before we can set it aside. *Local Union No. 657 v. Sidell*, 552 F.2d 1250, 1257 (7th Cir. 1977); *Millwright Local No. 1079 v. United Brotherhood of Carpenters & Joiners*, 878 F.2d 960, 962 (6th Cir. 1989); *Loretangeli v. Critelli*, 853 F.2d 186, 192 (3d Cir. 1988); *Newell v. International Brotherhood of Electrical Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986). The reason is to protect the internal affairs of unions from heavy-handed judicial interference, and is consistent with what has become in the last half century a settled though not total aversion to federal judicial intervention in labor relations. *Gustafson v. American Train Dispatchers' Ass'n*, 788 F.2d 1284, 1287 (7th Cir. 1986). There is no way in which ALPA's interpretation of the provisions bearing on the merger of seniority lists could be thought unreasonable.

Second, if the plaintiffs thought the arbitration award invalid because rendered in violation of the union's constitution and merger policy statement, the way to raise the point was to challenge the award in court, which they had six months to do. *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1269-73 (7th Cir. 1985). They have mounted a collateral attack on the award without even trying to bring themselves within the narrow limits of the rules that permit such attacks.

On both counts they are barred from making breach of contract arguments that seem in any event to have no merit. We move therefore to the Landrum-Griffin issues, where again we can be brief. ALPA destroyed such independence as the Air Wisconsin Master Executive Council may have had by placing it in a trusteeship controlled by ALPA. 29 U.S.C. § 462; *International Brotherhood of*

Boilermakers v. Local Lodge 714, 845 F.2d 687 (7th Cir. 1988). It did this because the council's officers had expressed their disagreement with ALPA's policy of defending the finality of arbitration awards that establish merged seniority lists and had acted on their disagreement by mailing to Air Wisconsin's pilots a proposal to cancel the award, together with a ballot for voting on the proposal. The creation of the trusteeship may seem, therefore, an act of retaliation for the exercise of the right of free speech. That right, however, insofar as it is sought to be asserted against a private entity such as ALPA, derives not from the First Amendment (a limitation on governmental, not private, action) but from the Landrum-Griffin Act itself, which confers on union members a right of free speech but subordinates it to "reasonable [union] rules as to the responsibility of every member toward the [union] as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 29 U.S.C. § 411(a)(2); see *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111, 121 n. 16 (1982).

The quoted language might have been written with these plaintiffs in mind. They used their positions as officers of the Air Wisconsin Master Executive Council to interfere with ALPA's performance of its duty of collective bargaining on behalf of the airline's pilots and to undermine ALPA's contractual commitment (made in the policy statement on mergers) to defend the arbitrators' award. The Council is not the collective bargaining representative and has no authority either to adopt or even to bargain for the adoption of a new seniority list. The plaintiffs are free to express their views, as vociferously as they care to do, concerning the seniority list, without thereby forfeiting positions to which they have been elected, *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 109 S. Ct. 639 (1989); but they are not entitled to continue to exercise a trust that they have abused. In asking Air Wisconsin's pilots to vote on a matter confided to another body (ALPA), the plaintiffs used their offices

No. 89-3350

to subvert the policies and commitments of the union, and by thus undermining the union by deed and not just by word they passed out of the protective field of Landrum-Griffin's free-speech clause even as broadly defined in *Lynn*.

What we have said answers the remaining contentions, that the trusteeship was imposed for an improper, retaliatory purpose and that it abridged the union members' right to vote. Collective bargaining under the Railway Labor Act and the other federal labor statutes illustrates representative rather than participatory democracy. The union conducts the negotiations. The workers vote on whether to be represented and by which union, and on whether to ratify the agreement negotiated by their representative, and on other proposals by the representative such as a strike call; but once an agreement is in force they have no right to change it until it expires. This is another example of intelligent finality. The agreement has a term of years (normally three) and during that time the workers are bound by it.

The plaintiffs make some other contentions, concerning procedural details of the trusteeship, but they have no possible merit so we pass them by in silence. The judgment of the district court dismissing the suit was correct, and is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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No. 90-842

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA, and THOMAS K. BLY,
Petitioners,

v.

CLIFFORD R. SANDERSON, Trustee and Acting Chairman of AIR WISCONSIN MASTER EXECUTIVE COUNCIL, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, WILLIAM P. HALE, Trustee, and DENNIS HIGGINS, Trustee,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' claims that their union violated the duty of fair representation, the union's Constitution and By-Laws, and the Landrum-Griffin Act by refusing to permit petitioners to nullify an arbitration award regarding pilot seniority in an airline merger which award must be treated as final and binding under longstanding union policy.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	5
THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS, DOES NOT RAISE ANY SIGNIFICANT ISSUE CONCERNING THE ADMINISTRATION OF FEDERAL LABOR LAW, AND WAS CORRECTLY DECIDED BELOW	5
CONCLUSION	11

TABLE OF AUTHORITIES

Cases — Page

Association of Contracting Plumbers v. *Local Union 2, United Ass'n of Journeymen*, 676 F. Supp. 523 (S.D.N.Y.), *aff'd*, 841 F.2d 461 (2d Cir. 1988) 9

Sheet Metal Workers' Int'l Ass'n v. *Lynn*, 109 S.Ct. 639 (1989) 4, 9, 10

Steele v. *Louisville & N. R.R.*, 323 U.S. 192 (1944) 6

United Ass'n of Journeymen v. *Local 334, United Ass'n of Journeymen*, 452 U.S. 615 (1981) 8

Vaca v. *Sipes*, 386 U.S. 171 (1967) 6

Statutes

Labor Management Relations Act, 29 U.S.C. § 185(a) 8

Labor Management Reporting and Disclosure (Landrum-Griffin) Act, 29 U.S.C. § 401 *et seq.*...*passim*

Railway Labor Act, 45 U.S.C. § 151 *et seq.* 2, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-842

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA, and THOMAS K. BLY,
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v.

CLIFFORD R. SANDERSON, Trustee and Acting Chairman of AIR WISCONSIN MASTER EXECUTIVE COUNCIL, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, WILLIAM P. HALE, Trustee, and DENNIS HIGGINS, Trustee,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated July 30, 1990, is reprinted in Petitioners' Supplemental Appendix ("P.S.A.") at 1a. The unreported memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is reprinted in Petitioners' Appendix ("P.A.") at 4a.

STATEMENT OF THE CASE

The facts are succinctly and accurately set forth in the opinion of Circuit Judge Posner for the court of appeals below, to which the Court is respectfully referred. (P.S.A. 2a-4a). In brief summary, following the merger of two airlines, Air Wisconsin, Inc. ("Air Wisconsin") and Mississippi Valley Airlines, Inc. ("MVA"), a dispute arose between the pilot groups of the two pre-merger airlines over how to merge the two pilot seniority lists. Both of the pre-merger pilot groups were represented by respondent Air Line Pilots Association, International ("ALPA"); ALPA also represented the combined pilot group employed by Air Wisconsin after the merger. Pursuant to a long established set of ALPA guidelines known as ALPA Merger Policy, the pre-merger pilot groups submitted their seniority dispute to a neutral arbitration panel, and the arbitration panel issued an award merging the two pre-merger seniority lists in October, 1985. ALPA Merger Policy provides that such awards "shall be final and binding on all parties to the arbitration and shall be defended by ALPA." (P.S.A. 2a).

Petitioners are a group of pre-merger Air Wisconsin pilots who seek to displace the pre-merger MVA pilots from the seniority rights they obtained under the arbitration award. In October, 1986, dissatisfied with the arbitration award that ALPA was committed to defend under its Merger Policy, petitioners undertook to change the award through actions of the Air Wisconsin Master Executive Council ("MEC"), the administrative body within ALPA that coordinates ALPA's representation of the Air Wisconsin pilots. An MEC is a subordinate body of ALPA, elected by the pilots of an airline for which ALPA is the collective bargaining representative under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* An MEC's powers are defined and limited by ALPA's Con-

stitution and By-Laws. In particular, an MEC is forbidden to "initiate any action that is inconsistent with [ALPA's] Constitution and By-Laws or with the best interests of [ALPA] or the general membership." (P.S.A. 3a).

Disregarding this prohibition and ALPA Merger Policy, the Air Wisconsin MEC, dominated by petitioners, sent to all Air Wisconsin pilots a secret ballot proposal to change the merged seniority list created by the arbitration award to a seniority list based solely on a pilot's date of hire with his pre-merger airline. The proposal would allow the pre-merger Air Wisconsin pilots, who constituted a majority of the post-merger pilot group, to diregard ALPA Merger Policy, to nullify the arbitration award, and to impair the seniority of the smaller group of pre-merger MVA pilots. The cover letter stated that the proposal would "pass" if "ratified" by a majority of ballots. Upon learning of this and related attempts to undermine ALPA policy, ALPA placed the Air Wisconsin MEC in trusteeship after due notice and hearing. In this lawsuit, petitioners claimed that, by refusing to revise the arbitrated seniority list, ALPA breached its duty of fair representation to them, violated ALPA's Constitution and By-Laws and policies, and violated the provisions of the Landrum-Griffin Act, 29 U.S.C. § 401 *et seq.*, governing trusteeships and the free speech and voting rights of union members.

In a memorandum opinion and order dated May 26, 1989, following submission of memoranda of law, affidavits and oral argument by the parties, the district court granted respondents' motion for summary judgment in its entirety. (P.A. 4a-20a). The United States Court of Appeals for the Seventh Circuit unanimously affirmed the district court's decision in an opinion written by Judge Posner. The Seventh Circuit held that ALPA satisfied its duty to "represent *all* members of the [Air Wisconsin pilot] group fairly, that is, without favori-

tism, prejudice or other discrimination . . . by establishing, long before the case arose, a fair *process* for determining seniority in an airline resulting from a merger." (P.S.A. 4a). A critical component of that fair process, the Seventh Circuit explained, is ALPA's established policy that "such arbitrations should be final and binding and its corollary that ALPA shall be obliged to defend them." (*Id.*) That policy of finality "serves important social purposes and we certainly cannot pronounce ALPA unfair for giving the arbitrators' determination of seniority as much finality as it has done." (P.S.A. 5a).

With respect to the claim that petitioners were contractually entitled to date of hire seniority under ALPA's Constitution and policy statements, the court of appeals held that the arguments, "that seem in any event to have no merit," were barred on two grounds, "each dispositive." (P.S.A. 9a). First, the well-established "principle that a union's interpretation of its own constitution, bylaws, and other promulgations is entitled to judicial deference [unless] unreasonable" barred petitioners' claim because "[t]here is no way in which ALPA's interpretation of the provisions bearing on the merger of seniority lists could be thought unreasonable." (P.S.A. 9a). Second, petitioners' claim was a time-barred collateral attack on the arbitration award. (*Id.*).

Finally, the court of appeals affirmed the dismissal of petitioners' Landrum-Griffin Act claims. Noting that Congress specifically subordinated union members' free speech rights to "reasonable [union] rules," 29 U.S.C. § 411(a)(2), the Seventh Circuit held that by asking the Air Wisconsin pilots to vote to change the arbitrated senority list in direct contravention of established ALPA policy, petitioners "used their [union] offices to subvert the policies and commitments of the union and by thus undermining the union by deed and not just by word they passed out of the protective field of Landrum-Griffin's free-speech clause even as broadly defined in [*Sheet Metal Workers' Int'l Ass'n* v. *Lynn*, 109 S.Ct. 639

(1989)]." (P.S.A. 10a-11a). The court further held that "what we have said answers the remaining contentions, that the trusteeship was imposed for an improper, retaliatory purpose and that it abridged the union members' right to vote." The court also rejected petitioners' additional contentions regarding procedural details of the trusteeship because "they have no possible merit." (P.S.A. 11a).

REASONS WHY THE WRIT SHOULD BE DENIED

THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS, DOES NOT RAISE ANY SIGNIFICANT ISSUE CONCERNING THE ADMINISTRATION OF FEDERAL LABOR LAW, AND WAS CORRECTLY DECIDED BELOW

Petitioners apparently argue that this case warrants this Court's review because it presents a conflict among the circuits concerning the duty of fair representation and important issues of law concerning (1) the contractual status of a union constitution and (2) the administration of the Landrum-Griffin Act. In fact, this case involves the routine application of settled principles of federal labor law to undisputed material facts and was manifestly decided correctly in Judge Posner's opinion for the Seventh Circuit.[1] We discuss each of petitioners' arguments below.

1. Petitioners argue that the court of appeals used a restrictive "intentional misconduct" standard which "proved to be lethal" to their duty of fair representation

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[1] Petitioners also shrilly contend that there were disputed issues of material fact which should have precluded summary judgment. The district court, however, held that petitioners "have failed to provide any facts to support the existence of a genuine issue of material fact necessary for trial." (P.A. 20a). The court of appeals, on *de novo* review, affirmed. (P.S.A. 11a). Those holdings are clearly correct and do not present an issue warranting Supreme Court review.

claim, in alleged conflict with the treatment they aver they would have received in other circuits or under the standard set forth by this Court in *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (Pet. at 38-39). This claim is frivolous. Nothing in this case turned upon an "intentional misconduct" formulation of the duty of fair representation standard. To the contrary, both the district court (*see* P.A. 10a) and the court of appeals referenced and employed the fair representation standard articulated in *Vaca* and *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944). Thus, the Seventh Circuit held:

> A union empowered by federal law to be the exclusive representative of a group of workers for purposes of bargaining with their employer over wages and over terms and conditions of employment has a correlative duty, fiduciary in character, to represent *all* members of the group fairly, that is, without favoritism, prejudice, or other discrimination. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967). *ALPA satisfied that duty in this case*, however, by establishing, long before the case arose, a fair *process* for determining seniority in an airline resulting from a merger.

(P.S.A. 4a (emphasis added); *see also* P.S.A. 6a-7a).[2]

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[2] The court of appeals also held that a vital part of ALPA's fair process is the policy that the arbitration awards shall be final and binding and shall be defended by ALPA:

> That the system ALPA has created places a good deal of power in the hand of arbitrators is not a sign of "unfairness" in the limited sense relevant to evaluating claims of breach of the duty of fair representation, especially since the alternative would be to encourage continuing and acrimonious disputes among workers by opening seniority to continual revision. It is not in the interest of organized labor to incite workers to fight among themselves over job rights. Nor is it in the workers' own interest, behind the veil of ignorance, that is, before they know whether they have been the winner or loser of the arbitration. Here as elsewhere finality serves important social purposes and we certainly cannot pronounce ALPA unfair for

Accordingly, this case does not raise any intercircuit conflict concerning the duty of fair representation that warrants this Court's review.

2. The district court and the court of appeals rejected petitioners' claim that general preamble-like language in ALPA's Constitution and By-Laws and other policy statements must be read to nullify ALPA Merger Policy and to "contractually" guarantee petitioners date of hire seniority in all mergers. In doing so, the district court and the court of appeals deferred to the interpretation of those documents by ALPA's highest governing bodies (empowered by ALPA's Constitution to interpret the Constitution and establish policy) because, the courts held, the union's interpretation was clearly "reasonable." (P.S.A. 8a-9a; P.A. 12a-13a).[3] Petitioners now argue that such federal judicial deference to a union's reasonable interpretation of its own constitution and other promulgations was improper, and that their "contractual" claims should have been evaluated by "applying the rules of contract interpretation that would apply to any other breach of contract action," such as a commercial contract, or even an "insurance policy." (Pet. 50-59). This argu-

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giving the arbitrators' determination of seniority as much finality as it has done.

(P.S.A. 5a). Accordingly, petitioners' ill-defined argument (*see* Pet. at 30-37) that ALPA breached its collective bargaining duty by not revising the arbitrated seniority list in subsequent collective bargaining with Air Wisconsin management, an argument that finds no support in the cases cited (or any other cases), is clearly without merit and provides no reason to grant the writ.

[3] In evaluating the reasonableness of ALPA's interpretation of its Constitution and policy statements, the courts below reviewed petitioners' "contractual" claims (based solely upon general "preambular" language inapplicable to merger situations that could not possibly override the specific language of ALPA Merger Policy regarding merger of seniority lists in an airline merger) and found petitioners' claims "in any event to have no merit." (P.S.A. 8a-9a; P.A. 12a-13a).

ment is also patently meritless and is unsupported by any authority that petitioners adduce (or could adduce).[4] While petitioners cite *United Ass'n of Journeymen* v. *Local 334, United Ass'n of Journeymen*, 452 U.S. 615 (1981), for their contract interpretation claim, even they admit that *Journeymen* specifically declined to rule on what substantive law should apply in actions to enforce union constitutions as "contracts between . . . labor organizations" under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). *Journeymen*, 452 U.S. at 627. (*See* Pet. at 51).[5] Both before and after *Journeymen*, the circuits have uniformly held that:

> a union's interpretation of its own constitution, bylaws, and other promulgations is entitled to judicial deference; we must be able to call the interpretation unreasonable, perhaps even "patently unreasonable," before we can set it aside. *Local Union No. 657* v. *Sidell*, 552 F.2d 1250, 1257 (7th Cir. 1977); *Mill-*

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[4] As the court of appeals below held, petitioners' "contractual" claims are also independently barred by, *inter alia*, the six-month limitations period applicable to their collateral attack on the arbitration award. (P.S.A. 9a). Thus, the decision below is correct without regard to the "contractual interpretation" question sought to be raised in the petition.

[5] Petitioners misread *Journeymen* in claiming that "this Court has held that union members may have enforceable contract rights against the union itself arising from the union constitution and related documents." (Pet. at 50). *Journeymen* was an action between two affiliated labor organizations, and this Court specifically did "not decide whether individual members may bring suit on a union constitution against a labor organization." *Journeymen*, 452 U.S. at 627 n.16. Moreover, *Journeymen* and the other cases cited by petitioners arose under Section 301(a) of the Labor Management Relations Act, not the Railway Labor Act, as in this case. The Railway Labor Act does not have a provision equivalent to Section 301(a). Because petitioners presented their "contractual" entitlement argument as part of their duty of fair representation claim (*see* P.A. 11a-13a), the courts below were not presented with the issue and did not rule upon whether an individual union member may bring a breach of contract action grounded on a union constitution against the union under the Railway Labor Act.

> *wright Local No. 1079* v. *United Brotherhood of Carpenters & Joiners*, 878 F.2d 960, 962 (6th Cir. 1989); *Loretangeli* v. *Critelli*, 853 F.2d 186, 192 (3d Cir. 1988); *Newell* v. *International Brotherhood of Electrical Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986). The reason is to protect the internal affairs of unions from heavy-handed judicial interference, and is consistent with what has become in the last century a settled though not total aversion to federal judicial intervention in labor relations. *Gustafson* v. *American Train Dispatchers' Ass'n*, 788 F.2d 1284, 1287 (7th Cir. 1986)..

(P.S.A. 9a). *See also Association of Contracting Plumbers* v. *Local Union 2, United Ass'n of Journeymen*, 676 F.Supp. 523, 529-30 (S.D.N.Y.), *aff'd*, 841 F.2d 461, 468 (2d Cir. 1988). Petitioners offer no reason why the Court should overturn this settled standard for reviewing a union's interpretation of its own Constitution and By-Laws. Accordingly, Judge Posner's treatment of petitioners' alleged "contract" claim under ALPA's Constitution and By-Laws does not warrant this Court's review.

3. Petitioners finally contend that, contrary to the Seventh Circuit's holding, the Landrum-Griffin Act, as interpreted in *Sheet Metal Workers' Int'l Ass'n* v. *Lynn*, 109 S.Ct. 639 (1989), entitles union officials to circulate a ballot designed to nullify and violate ALPA's Merger Policy. This claim, too, is baseless. As noted above, the court of appeals (and the district court) expressly considered *Lynn*, and the decision below is consistent with *Lynn* in every respect. (*See* P.S.A. 9a-11a; P.A. 17a-18a). Section 101(a)(2), the free speech provision of the Landrum-Griffin Act, subjects the right of "[e]very member of any labor organization . . . to express any views, arguments, or opinions" to "reasonable [union] rules." Specifically, that section provides that:

> nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reason-

> able rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2). As the court of appeals below held, the "reasonable rules" statutory proviso requires rejection of petitioners' free speech claim under the Landrum-Griffin Act:

> The quoted language might have been written with these plaintiffs in mind. They used their positions as officers of the Air Wisconsin Master Executive Council to interfere with ALPA's performance of its duty of collective bargaining on behalf of the airline's pilots and to undermine ALPA's contractual commitment (made in the policy statement on mergers) to defend the arbitrators' award. The Council is not the collective bargaining representative and has no authority either to adopt or even to bargain for the adoption of a new seniority list. The plaintiffs are free to express their views, as vociferously as they care to do, concerning the seniority list, without thereby forfeiting positions to which they have been elected, *Sheet Metal Workers' Int'l Ass'n* v. *Lynn*, 109 S.Ct. 643 (1989); but they are not entitled to continue to exercise a trust that they have abused. In asking Air Wisconsin's pilots to vote on a matter confided to another body (ALPA), the plaintiffs used their offices to subvert the policies and commitments of the union, and by thus undermining the union by deed and not just by word they passed out of the protective field of Landrum-Griffin's free-speech clause even as broadly defined in *Lynn*.

(P.S.A. 10a-11a). Thus, the facts in this case are completely unlike those in *Lynn*;[6] as the court of appeals

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[6] In *Lynn*, an elected local business representative was improperly removed by the union merely for exercising his own right as a union member of speaking against a proposed dues increase at a union meeting.

below correctly held, ALPA's actions were clearly lawful under the Landrum-Griffin Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 90-842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

vs.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Pages
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
I. THE SEVENTH CIRCUIT APPLIES A DUTY OF FAIR REPRESENTATION STANDARD MORE RESTRICTIVE THAN THAT OF ANY OTHER CIRCUIT.....	1
II. THE DECISION BELOW ALSO CONFLICTS WITH OTHER CIRCUITS ON AN ISSUE OF CONTRACT INTERPRETATION.....	5
III. RESPONDENTS' LANDRUM-GRIFFIN ARGUMENTS IGNORE THE CONFLICTS BETWEEN THE SEVENTH CIRCUIT'S DECISION AND DECISIONS FROM OTHER CIRCUITS.....	10
IV. RESPONDENTS' ARBITRATION AWARD ARGUMENTS POINT UP THE NEED FOR REVIEW.....	13
CONCLUSION.....	16
APPENDIX A	

TABLE OF AUTHORITIES

Pages

CASES

Hotel & Restaurant Employees & Bartenders v. Rollison, 615 F.2d 788 (9th Cir. 1980)..... 11

Lamb v. Miller, 660 F.2d 792 (D.D.C. 1984)..... 11

Loretangeli v. Critelli, 853 F.2d 186 (3rd Cir. 1988)..... 10

Olsen v. United Parcel Service, Inc., 892 F.2d 1290 (7th Cir. 1990)..... 3

Pignotti v. Local 3, Sheet Metal Workers, 343 F. Supp. 236, (D. Neb. 1972), aff'd, 477 F.2d 825 (8th Cir.), cert. denied, 414 U.S. 1067 (1973).....11-12

Sabolsky v. Budzanski, 457 F.2d 1245 (3d Cir.) cert. denied, 409 U.S. 853 (1972)..... 12

Thomas v. United Parcel Service, Inc., 890 F.2d 909 (7th Cir. 1989)... 3-4

United Ass'n of Journeymen
v. Local 334, United Ass'n
of Journeymen, 452 U.S. 615
(1981)..... 8-9

United Independent
Flight Officers, Inc.
v. United Airlines, Inc.,
756 F.2d 1262
(7th Cir. 1985)..... 10

Vaca v. Sipes,
386 U.S. 171 (1967)..... 1

STATUTES

The Labor-Management
and Disclosure Act of 1959
("Landrum-Griffin Act")
29 U.S.C. § 401 et seq.....11-12

The Railway Labor Act
Section 2,
45 U.S.C. § 152 First.....14-15

ARGUMENT

I. THE SEVENTH CIRCUIT APPLIES A DUTY OF FAIR REPRESENTATION STANDARD MORE RESTRICTIVE THAN THAT OF ANY OTHER CIRCUIT

Respondents' contention that the decision herein did not apply the Seventh Circuit's subjective "intentional misconduct" doctrine rather than the contrary interpretation given by all other circuits having ruled upon the issue to the rule of Vaca v. Sipes, 386 U.S. 171, 177 (1967), is refuted by both opinions below. (Res. Br. pp. 5-7.)

The district court's opinion states (10a):

> "... the Seventh Circuit has limited suits for breach of the duty of representation to instances of intentional misconduct by the union. Dober Roadway Exp., Inc., 707 F.2d 292, 294 434 (7th Cir. 1983). Hoffman v. Lonza, Inc., 658 F.2d 519, 522 (1981)." [Emphasis added.]

The Seventh Circuit's opinion on appeal confirms that it also utilized the "intentional misconduct" standard in this case (5sa[1]):

> "The system that ALPA has created for determining seniority in a merged work force is not biased in favor of one group of workers or prejudiced against another. It was likely to yield an award in favor of Air Wisconsin's pilots as in favor of Mississippi Valley's. It is fair, and nothing more is required to comply with the duty of fair representation, since "so long as the union does not intentionally harm a member or class members, it will be deemed to have represented its members fairly." Olsen v. United Parcel Service, 892 F.2d 1290, 1294 (7th Cir. 1990). [Emphasis added.]

In addition to stating that unless a union acts to "intentionally harm" a member, "it will be deemed to have represented its members fairly," the

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[1]Citations followed by the suffix "sa" refer to the Supplemental Appendix filed by petitioners containing the Seventh Circuit's opinion, which is also reported at 909 F.2d 213 (7th Cir. 1990).

Seventh Circuit's opinion as quoted above expressly relied upon another Seventh Circuit decision, Olsen v. United Parcel Service, 892 F.2d 1290 (7th Cir. 1990).

Olsen also articulates the "intentional misconduct" doctrine as the rule of the Seventh Circuit (892 F.2d at 1296):

> "While the Union's decision not to investigate might have been an "error[] in judgment," Hines, 424 U.S. at 571, 96 S.Ct. at 1059, and perhaps even negligent representation, it falls short of the intentional misconduct standard adopted by this Circuit in Hoffman v. Lonza, 658 F.2d 519 (7th Cir. 1981) ..." (Emphasis added.)

Moreover, the Seventh Circuit judge who wrote the opinion in Olsen was the same judge who wrote the footnote in the opinion in Thomas v. United Parcel Service, Inc., 890 F.2d 909 (7th Cir. 1989), which explicitly states that the

Seventh Circuit is "the only circuit ... to require proof of intentional misconduct." (890 F.2d at 922, fn. 5.)

Thus, if the courts below were applying some other standard, they clearly would have said so, instead indicating the contrary to be the case.

Certiorari therefore should be granted to determine whether the subjective "intentional misconduct" doctrine which the Seventh Circuit is the lone circuit to apply in Duty of Fair Representation cases is incorrect, or whether virtually every other circuit should be brought into line with the Seventh Circuit's rule.

II. THE DECISION BELOW ALSO CONFLICTS WITH OTHER CIRCUITS ON AN ISSUE OF CONTRACT INTERPRETATION

Respondents' brief relegates to a footnote (Res. Br. fn. 1, p. 5) the important issue involving the Seventh Circuit's mis-use of summary judgment in a case presenting disputed fact issues involving the rights of union members that rest upon the interpretation of a union constitution and related documents.

As pointed out in the Petition herein (Pet. pp. 56-58), other circuits deny summary judgment when confronted with disputed fact issues involving the interpretation of ambiguous contractual rights.

Indeed, the passage from the Seventh Circuit opinion quoted in respondents' brief (Res. Br. pp. 8-9) includes citations to four cases that on

examination state that summary judgment may not be granted when there are outstanding issues of fact involving the interpretation of a contract.

The ambiguity involved in the pertinent document relied upon by respondents is revealed inadvertently by their brief which repeatedly mis-cites the document as the "ALPA Merger Policy." (Res. Br. pp. 2, 3, 7, fn. 3.)

However, the correct title of the document is not a singular "ALPA Merger Policy," but is a plural Merger Policies. (Seventh Circuit Appendix, p. 102; a copy of the title page of the document is annexed hereto as Appendix A.) Nor is the title of the document limited to "Merger Policies;" in its entirety the title reads "Merger Policies and Related Employee Protective Provisions."

Moreover, the "Related Employee Protective Provisions" as found in the document are not limited to a single source, or even a single unit within ALPA, but constitute a hodgepodge of pronouncements distilled from the edicts issued by various bodies within ALPA from time to time over the years. (Seventh Circuit Appendix, A-102, et seq.)

Respondents' contention that this eclectic collection of summaries overrides the direct language used in the ALPA Constitution and By-Laws (Res. Br. p. 7, fn. 3) in itself represents a remarkably curious canon of constitutional interpretation.

The further assumption that these congeries of statements speak with such bright line clarity that the rights of individual members arising thereunder

may be appropriately resolved by summary judgment is contrary to the decisions of every circuit that may be even remotely considered to be analogous, whatever standard of interpretation is considered to be applicable.

With regard to the applicable standard of interpretation, respondents' discussion of United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen, 452 U.S. 615 (1981), cited in respondents' brief (Res. Br. pp. 8-9 and fn. 5), itself demonstrates the importance of review of the important issues raised here that were left open by that decision.

Under respondents' a priori reasoning (Res. Br. p. 8, fn. 5), courts have virtually no jurisdiction to interpret contract claims by union members against the unions to which they

pay very substantial dues for the performance of various services, thereby depriving such union members of one of the chief benefits of the rule of law in a free society.[2]

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[2]Respondents argue that such claims are barred by a six-month statute of limitations. (Res Br. p. 8, fn. 4.) However, as noted in petitioners' initial brief, the contractual issues concerning the union's obligation to bargain concerning the seniority rights of its members under the ALPA Merger Policies has prospective application to the negotiation of future contracts and, therefore, would not be time-barred. Initial Brief, pp. 42-44, and 56.

Moreover, the interpretation of such provisions is directly involved in the action by ALPA in imposing the trusteeship herein on November 25, 1986, and the instant action was brought in April 1987, well within six months thereafter. (Seventh Circuit Appendix, A-2, 23.)

The further argument in footnote 5 on page of respondents' brief that Journeymen is inapplicable because it did not involve union members in a contract dispute with the international but rather union locals and in any event was decided under Section 301(a) of the Labor Management Relations Act, not the Railway Act, which (footnote continued)

III. RESPONDENTS' LANDRUM-GRIFFIN ARGUMENTS IGNORE THE CONFLICTS BETWEEN THE SEVENTH CIRCUIT'S DECISION AND DECISIONS FROM OTHER CIRCUITS

Respondents' arguments fail to address the conflicts between the Seventh Circuit's decision and those in other circuits involving the

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(footnote from prior page) has no such provision, is misplaced also.

Clearly, union members can raise contract disputes with their international union. See Loretangeli v. Critelli, 853 F.2d 186, 187 (3d Cir. 1988) ("The primary question raised is the scope of the "good cause" prerequisite to the institution of federal suits by union members against union officials under the Labor Management Reporting and Disclosure Act"). (Emphasis added.)

As to the contention that contract claims raised under Section 301(a) are distinguishable, Section 301(a) has also been held to apply to cases falling under the Railway Labor Act. United Independent Flight Officers, Inc. v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985).

infringement of the union democracy guarantees of the Landrum-Griffin Act. (Res. Br. 9-11.)

Both Lamb v. Miller, 660 F.2d 792, 794 (D.C. Cir. 1984), and Hotel & Restaurant Employees & Bartenders v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980), hold that summary judgment may not be granted upon a showing of bad faith in removing or otherwise silencing union dissidents, as here presented.

As stated in Lamb v. Miller (660 F.2d at 794):

> "When there is some evidence that the reason for removal from office was permissible and some evidence that the reason was impermissible, the question whether protected activities were a cause for the removal must be resolved by the trier of fact. The motivation of the dismissal is thus a question of fact." (Citations omitted; emphasis added.)

Pignotti v. Local 3, Sheet Metal Workers, 343 F. Supp. 236, 242-3 (D.

Neb. 1972), aff'd, 477 F.2d 825 (8th Cir.), cert. denied, 414 U.S. 1067 (1973), and Sabolsky v. Budzanski, 457 F.2d 1245 (3d Cir.), cert. denied, 409 U.S. 853 (1973), also emphasize the importance of the protection of the free speech and voting rights afforded by the Landrum-Griffin Act to union members.

Respondents' brief does not disagree that the Seventh Circuit's decision is inconsistent with the four decisions from other circuits cited above, nor does it discuss those cases, although they were discussed at pages 45-47 of the Petition for Certiorari.

Supreme Court review is warranted by the inconsistency between the decisions in other circuits and the Seventh Circuit's decision in adjudicating Landrum-Griffin rights infringed by the imposition of a four-year union

trusteeship that admittedly was imposed to block the exercise of free speech and voting rights claimed by union members.

IV. RESPONDENTS' ARBITRATION AWARD ARGUMENTS POINT UP THE NEED FOR REVIEW

The "Question Presented" in respondents' brief adopts the view that petitioners' desire to seek changes in future contracts through collective bargaining would "nullify" a 1985 arbitration award. (Res. Br. p. (i).)

It is not denied by respondents that the arbitration award became embodied in a bargaining agreement that has since expired. Thus nothing was "nullified." The award was given full force and effect during the term of the contract.

Petitioners submit that the version of the "Question Presented" as stated in

respondents' brief itself demonstrates the importance of review by this Court.

Whether, as respondents contend, an arbitration award can forever obviate the mandatory bargaining duties imposed by the Railway Labor Act upon a statutory bargaining representative is a matter of no little importance in the proper operation of the collective bargaining system.

While the proper place of labor arbitration has been recognized, the statutory scheme of the Railway Labor Act gives far greater importance to performance of the duty of collective bargaining as the means relied upon to obviate interruptions to interstate commerce (45 U.S.C. § 152, First).

The "Trilogy" cases of course confirm the importance of labor arbitration (Petition, p. 35), but the award here

involved is not the product of the traditional kind of labor-management arbitration involved in the Trilogy cases and their progeny. Instead, the arbitration herein results from an intra-union dispute situation for which there is no provision in either the Railway Labor Act or the National Labor Relations Act, as amended.

Moreover, the Trilogy arbitrations were all "rights" arbitrations as opposed to an "interest" arbitration such as is here involved. (Pet., pp. 35-36.)

Whether the result of such an arbitration can be used to bar forever the performance of the statutory bargaining duties of a bargaining representative warrants, as the issue has never previously been decided.

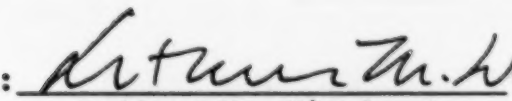
CONCLUSION

The petition for a writ of certiorari should be granted.

January 17, 1991

Respectfully submitted,

WISEHART & KOCH

By: 

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APPENDIX A

A-102

Air Line Pilots
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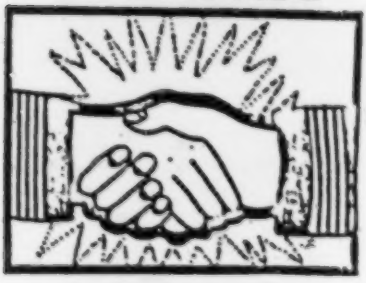
MERGER POLICIES



and Related
Employee Protective
Provisions

January 1985